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## Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth--How Long a Time is That

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# Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?†

Charles F. Wilkinson\* and John M. Volkman\*\*

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*In this insightful analysis of the role of the courts in determining whether an Indian treaty has been abrogated by Congress, the authors argue that confusion over the proper judicial test for finding an abrogation all too often results in the destruction of precious American Indian treaty rights. They propose an objective test fully consonant with the importance of treaty guarantees and the unique relationship of American Indians to the federal government: that Indian treaty rights should be abrogated only by express legislative action stating both the specific promises about to be broken and the intent of Congress to break them.*

Many of the unique and most cherished rights of American Indians are preserved in treaties. The duration of the treaty-guaranteed rights to live, hunt, and fish on ancestral lands is typically described as "forever"<sup>1</sup> or "permanent."<sup>2</sup> United States Senator Sam Houston used the following language to characterize the perpetual nature of these promises:

As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again be removed from your present habitations.<sup>3</sup>

The most visible treaty rights are related to the many treaty-created reservations. There are, however, numerous other rights that vary according to the individual treaties, including educational benefits,<sup>4</sup>

1. See, e.g., Treaty with the Winnebago Tribe, Mar. 8, 1865, 14 Stat. 671; Treaty with the Wyandott Indians, Mar. 17, 1842, 11 Stat. 581; Treaty with the Cherokees, May 6, 1828, 7 Stat. 311; Treaty with the Seneca Nation, June 30, 1802, 7 Stat. 72.

2. See, e.g., Treaty with the Chippewa Tribe, Feb. 22, 1855, 10 Stat. 1165, 1166; Treaty with the Cherokee Tribe, Dec. 29, 1835, 7 Stat. 478; Treaty with the Delaware Tribe, Sept. 24, 1829, 7 Stat. 327; Treaty with the Cherokee Nation, May 6, 1828, 7 Stat. 311.

3. CONG. GLOBE, 33d Cong., 1st Sess., App. 202 (1854).

4. See, e.g., Treaty with the Sioux Indians, Apr. 29 *et seq.*, 1868, 15 Stat. 635; Treaty with the Creek Nation, Aug. 7, 1790, 7 Stat. 35; and Treaty with the Kaskaskias, Aug. 13, 1803, 7 Stat. 78. In many cases education benefits guaranteed by treaty are now fulfilled by the boarding schools and day schools which are administered either by the Bureau of Indian Affairs or by tribal groups with funds obtained from the Bureau. See, e.g., *Hearings on the Dep't of Interior, Bureau of Indian Affairs and Related Agencies Fiscal Year 1974 Budget Before the Senate Comm. on Appropriations*, 93d Cong., 1st Sess., 3933, 3999-4000 (1973). In addition, those schools and other schools educating Indian children are eligible to receive expenditures pursuant to the Johnson-O'Malley Act, 25 U.S.C. § 452-54, (1970) which provides supplemental educational

general assistance benefits,<sup>5</sup> the provision of agricultural and other technical expertise,<sup>6</sup> and health care.<sup>7</sup> Indeed, one of the basic functions of the Bureau of Indian Affairs is the administration and protection of Indian treaty rights.<sup>8</sup>

It is important to recognize that the American Indian's treaty rights are not "gifts" or "grants." Indians fought hard, bargained extensively, and made major concessions in return for such rights.<sup>9</sup> Treaties can, therefore, properly be regarded as negotiated contracts of a high order. The Constitution reflects this priority in its declaration that Indian treaties are the "supreme Law of the Land."<sup>10</sup>

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programs for Indian children. See *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 726 (D.N.M. 1973). See also 25 C.F.R. §§ 33.1-6 (Supp. 1974).

5. See, e.g., Treaty with the Five Nations, Apr. 23, 1792 (unpublished, Archives No. 19). The right of American Indians to participate in the general assistance program of the Bureau of Indian Affairs is discussed in detail in *Morton v. Ruiz*, 415 U.S. 199 (1974).

6. See, e.g., Treaty with the Menominee Nation, Feb. 8, 1831, 7 Stat. 342, 344; Treaty with the Chippewas, Sept. 24, 1819, 7 Stat. 203, 205; Treaty with Miami Nation, Oct. 6, 1818, 7 Stat. 189, 191.

7. See, e.g., Treaty with the Sioux Indians, Apr. 29 *et seq.*, 1868, 15 Stat. 635; Treaty with the Nez Perce, June 11, 1855, 12 Stat. 957; Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939. The responsibility for providing health services to Indians has now been transferred from the Bureau of Indian Affairs to the Public Health Service, an agency of the Department of Health, Education, and Welfare. 42 U.S.C. § 2001 (1970).

8. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 44 (U.N.M. ed. 1971) [hereinafter cited as COHEN, FEDERAL INDIAN LAW]. The Secretary of Interior has an "obligation to safeguard the property" of recognized tribes and the obligation must be exercised with "the most exacting fiduciary standards." *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322-23 (Ct. Cl. 1966).

Special mention should be made of the debt owed by all who deal with Indian law to Felix S. Cohen, former Associate Solicitor for Indian Affairs, for his comprehensive treatise, originally published in 1942. Justice Frankfurter has described it as "an acknowledged guide for the Supreme Court in Indian litigation." F. FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER 143 (1967). The Arizona Supreme Court has called it "monumental." *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456, 460 (1948). Similarly, thanks should be given to the very progressive School of Law at the University of New Mexico for republishing Cohen's book in 1971 and thus providing access to an invaluable work that had become virtually unobtainable.

9. See text accompanying notes 29-56 *infra*.

10. Article VI of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2. This provision applies with regard to Indian treaties. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Treaties are superior to state laws, including state constitutions, see *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880), and are accorded equal dignity with federal statutes. *Edye v. Robertson*, 112 U.S. 580, 599 (1884) (the Head Money Cases); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884). Some authorities have characterized treaties as being on an equal footing with the Constitution. See *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). But see

But—and this is a doctrine which surprises many—treaty rights can be abrogated unilaterally by Congress. Congressional power to abrogate is based on the notion that a treaty represents the political policy of the nation at the time it was made. If there is a change of circumstances and the national interest accordingly “demands” a modification of its terms, then Congress may abrogate a treaty in whole or in part.<sup>11</sup>

When Indian treaty rights are abrogated, the tribe or individual is often entitled to be compensated in cash for the loss.<sup>12</sup> There are several reasons, however, both tangible and intangible, why payment in cash is insufficient to compensate fairly for the loss of such rights.

The loss of Indian tribal land involves a significantly greater loss than is the case with land held by private non-Indian owners. Unlike private citizens, Indian tribes exert sovereignty over their land and, like all governments, regulate conduct within the governmental (*i.e.*, reservation) boundaries.<sup>13</sup> In addition, reservations are sanctuaries where land is not subject to taxation;<sup>14</sup> where individual Indians are free of most taxes;<sup>15</sup> where many state laws do not apply;<sup>16</sup> and where Indian

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Reid v. Covert, 354 U.S. 1, 17 (1957). One obvious distinction between treaty provisions and constitutional provisions is that the former can be more easily invalidated. See U.S. CONST. art. V. The treaty-making power is much broader than other constitutional powers, for with respect to internal affairs the government possesses only enumerated powers, and such implied powers as are necessary and proper to carry out enumerated powers, while federal power over treaties and foreign affairs is not subject to those limitations. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-21 (1936).

11. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). For a thorough historical review of treaty-making during the early years, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 31 (1831) (Baldwin, J., concurring in result).

The holding in *Lone Wolf* may be subject to question. This Article assumes, however, that *Lone Wolf* and the cases following it will remain the law with respect to the power of Congress to abrogate Indian treaties. Nevertheless, this issue presents a fruitful area for future study.

12. *United States v. Creek Nation*, 295 U.S. 103 (1935). Cf. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955) (dictum); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) (dictum).

13. *Williams v. Lee*, 358 U.S. 217 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). Indian tribes are distinct, independent political entities and have all the powers of a sovereign nation except those which Congress has expressly taken from them. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). For a classic statement of Indian tribal sovereignty see COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 122-50. See also Bean, *The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers*, 49 N. DAK. L. REV. 303 (1973).

14. See, e.g., *Squire v. Capoeman*, 351 U.S. 1, 9 (1956) (recognizing the tax “‘exemption accorded tribal and restricted Indian lands’”).

15. E.g., *McClanahan v. State Tax Comm’n*, 411 U.S. 164 (1973) (Navajo reservation Indian not subject to state income tax for income earned on reservation); *Warren Trading Post v. State Tax Comm’n*, 380 U.S. 685 (1965) (state tax on gross proceeds of sales or on gross income not applicable to federally licensed Indian trader with respect to sales made on reservation). See generally Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N. DAK. L. REV. 267 (1973).

16. The extent to which tribes are free from state law varies from state to state

customs and traditions are supreme. Thus, loss of tribal land means a closing of the ring by a foreign culture.

Since much has been said about the primacy of land in the cultures and religions of American Indians, it is unnecessary to make that point in detail here. Suffice it to say that land plays a far more important role in Indian than in non-Indian life.<sup>17</sup> The significance of land to Indians was well stated by Justice Black:

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.<sup>18</sup>

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and, in some cases, from reservation to reservation within states. Many tribes have tribal courts that exercise "broad civil and criminal jurisdiction" over matters occurring on reservations; such jurisdiction excludes 13 felonies set forth in the Major Crimes Act, 18 U.S.C. § 1153 (1970), but includes controversies between Indians and non-Indians if the claim arises on the reservation. *Williams v. Lee*, 358 U.S. 217, 222 (1959). One recent case held that tribal criminal jurisdiction extends to crimes committed by non-Indians on trust lands on the reservation. *Oliphant v. Schlie*, Civ. No. 511-73C2 (W.D. Wash., April 5, 1974). In certain states, sometimes called "Public Law 280 states," tribes do not have criminal jurisdiction, 18 U.S.C. § 1162 (1970), or civil jurisdiction, 28 U.S.C. § 1360 (1970) (both sections originally enacted as Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 589). In the future, Public Law 280 will not apply to any tribe without its consent. 25 U.S.C. §§ 1321(a), 1322(a), 1326 (1970). All tribes are now subject to the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302-03 (1970), which permits some suits against tribes to be brought in federal courts.

17. "The principal point of dispute between white and Indian historically has been land. The greatest legal gap between the two cultures has been the respective attitudes toward [the land]." W. WASHBURN, *RED MAN'S LAND—WHITE MAN'S LAW* 143 (1971). To whites, land is a "commodity" while to Indians it is the "sacred and inalienable mother." *Id.* For an imaginative analysis of the difference between the attitudes of Indians and non-Indians toward land, see *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 68-111 (E. Cahn ed. 1969). Unlike Judeo-Christian religions, the religions of virtually all American Indians are founded upon notions of the earth and ancestral lands. Religious ceremonies were "considered as the means for keeping the cosmic order in its course and the continuance of the earth and its life processes." G. WELT-FISH, *THE LOST UNIVERSE—THE WAY OF LIFE OF THE PAWNEE* 10 (Ballantine ed. 1971). See also A. SLICKPOO & D. WALKER, *NOON NEE ME POO* 57-63 (1973). In supporting legislation to transfer Blue Lake to the Taos Pueblo because of the lake's deep religious significance, Secretary Stewart Udall remarked: "Blue Lake symbolizes the unity and continuity of the Pueblo, it is the central symbol of these Indian's religion as the Cross is to Christianity." *Hearings on H.R. 3306, S. 1624 and S. 1625 Before the Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 51 (1968).

18. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion) (footnotes omitted).

Indian land really is, then, "worth more than money" to the tribe and people involved.<sup>19</sup>

The loss of treaty-based hunting and fishing rights can also be disastrous. Many Indians subsist largely on fish and, although it may seem strange to the city-dweller, wild game, including venison, is a staple on many Indian reservations.<sup>20</sup> In addition, treaty-guaranteed fishing rights provide a major source of commercial income to many American Indians, particularly those in the Great Lakes area and in the Pacific Northwest.<sup>21</sup> Thus, when these treaty rights to hunt and fish are abrogated or sharply limited by state or federal regulatory requirements, the loss is likely to be felt both at the dinner table and in the pocketbook.

Because of the great importance of the rights guaranteed by Indian treaties, the power of Congress to abrogate should be exercised sparingly. Indian treaties should be abrogated only if "consistent with

19. A memorable statement was made by a chief of the Blackfeet Tribe on being asked to sign a treaty:

Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to men and animals. We cannot sell the lives of men and animals; therefore we cannot sell this land. It was put here for us by the Great Spirit and we cannot sell it because it does not belong to us. You can count your money and burn it within the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of grass of these plains. As a present to you, we will give you anything we have that you can take with you; but the land, never.

T. McLUHAN, *TOUCH THE EARTH* 53 (Pocket Book ed. 1972).

20. W. BROPHY & S. ABERLE, *THE INDIAN—AMERICA'S UNFINISHED BUSINESS* 204 (1966) (Menominee Tribe of Wisconsin); T. STERN, *THE KLAMATH TRIBE—A PEOPLE AND THEIR RESERVATION* 192-93 (1966) (Klamath Tribe of Oregon). Courts have recognized this reliance upon fish and game for subsistence. See *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) (recognizing "the highly significant role that hunting and trapping played (and continues to play) in the lives of the Klamaths"); *People v. Jondreau*, 384 Mich. 539, 551-52, 185 N.W.2d 375, 381 (1971) ("While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence . . ."); *State v. Gurnoe*, 53 Wis. 2d 390, 404, 192 N.W.2d 892, 899 (1972) ("history of the Chippewa reveals an uninterrupted history of fishing on Lake Superior . . . for more than 300 years").

21. "Subsequent to the execution of the treaties and in reliance thereon the members of [the Warm Springs, Yakima, Umatilla, and Nez Perce] tribes [of Oregon, Washington and Idaho] have continued to fish for subsistence and commercial purposes at their usual and accustomed fishing places. Such fishing provided and still provides an important part of their subsistence and livelihood." *Sohappy v. Smith*, 302 F. Supp. 899, 905 (D. Ore. 1969). See also *Menominee Tribe of Indians v. United States*, 388 F.2d 998, 1003 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968) ("right to hunt and fish Indian fashion is a valuable property right" of Menominees); *United States v. Washington*, 384 F. Supp. 312, 340 (W.D. Wash. 1974), *aff'd and remanded*, Civ. Nos. 74-2414, 74-2437-40, 74-2567, 74-2602, 74-2705 (9th Cir. June 4, 1975) ("right to fish . . . is the single most highly cherished interest and concern of the present members of plaintiff tribes").

perfect good faith toward the Indians."<sup>22</sup> Plainly, these treaty rights are significant enough that our jurisprudence should carefully guard against their loss.

The issue of treaty abrogation often arises in the context of condemnation actions brought by such mission-oriented agencies as the Army Corps of Engineers and the Bureau of Reclamation. Using their power of eminent domain, these agencies seek to include tribal land in a recreation, flood control, reclamation, or other public works project.<sup>23</sup> Hunting and fishing rights are threatened in much the same manner. For example, a planned reservoir may flood traditional fishing sites and destroy the salmon runs,<sup>24</sup> or an upstream diversion may destroy spawning grounds.<sup>25</sup> Fishing and hunting rights are also jeopardized in state criminal prosecutions for violating state fish and game laws.<sup>26</sup> Reservation lands and resources are also coveted by non-governmental interests such as coal companies, power companies, and railroads.<sup>27</sup>

The litigation frequently centers on the non-Indian party's argument that a congressional statute—typically general in nature and saying nothing on its face about abrogation—has abrogated a tribe's

22. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

23. E.g., *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959); *United States v. 687.30 Acres of Land*, 319 F. Supp. 128 (D. Neb. 1970), *appeals dismissed*, 451 F.2d 667 (8th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D.), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958).

24. E.g., *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). Cf. *Umatilla Confederated Tribes v. Calloway*, Civ. No. 72-211 (D. Ore., Aug. 17, 1973). A dispute concerning such a project is presently at issue between the Umatilla Confederated Tribes and the Army Corps of Engineers. The Tribe is bitterly opposing the proposed reservoir, which will flood 2.5 miles of traditional fishing sites. Cf. UNITED STATES ARMY CORPS OF ENGINEERS, DRAFT ENVIRONMENTAL STATEMENT, CATHERINE CREEK DAM AND LAKE, CATHERINE CREEK, OREGON 21 (1972).

25. E.g., *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). Cf. *In re Puget Sound Power & Light Co.*, Project No. 2497 (FPC Application filed Nov. 18, 1964; Petition to Intervene of Muckleshoot Indian Tribe filed June 10, 1970).

26. E.g., *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), *cert. denied*, 347 U.S. 937 (1954); *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971); *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972). The leading case is *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, Civ. Nos. 74-2414, 74-2437-40, 74-2567, 74-2602, 74-2705 (9th Cir. June 4, 1975).

27. E.g., *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941) (title dispute between railroad and tribe); *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207 (D.C. Cir. 1973), *rev'd*, 43 U.S.L.W. 4334 (March 3, 1975) (license proceeding concerning coal-burning power plants on reservation); *Lomayaktewa v. Morton*, No. Civ.-72-106 Pct. WEC (D. Ariz., Feb. 15, 1973), *appeal pending* (action to invalidate coal lease); *Walker River Paiute Tribe v. Southern Pac. Trans. Co.*, Civ. No. R-2707 (D. Nev., filed July 17, 1972) (title dispute between railroad and tribe).



right to hold land "forever" or to hunt or fish free of state control. Since only Congress can abrogate Indian treaty rights,<sup>28</sup> the focal point for analysis is whether Congress actually did abrogate the treaty right. This difficult question must be answered by the courts.

Unfortunately, the body of law protecting basic Indian treaty rights is in evident disarray. There are so many tests for determining whether an abrogation has been effected, and most of them are so vague, that a court has little recourse but to arrive at an ad hoc, almost arbitrary decision when faced with the question of whether a particular treaty guarantee has been abrogated by Congress.

Since this Article deals with the loss of treaty rights, it is important first to discuss the nature of the treaties themselves and of the rights they guarantee. Section I briefly reviews the negotiation process, then explores the federal-Indian trust relationship and the judicial interpretation of Indian treaties to safeguard this relationship. Section II describes the present state of the law on abrogation of Indian treaties. Finally, section III proposes a standard of judicial review for Indian treaty abrogation cases. The proposed standard would enhance the protection of Indian treaty rights, yet give Congress enough latitude that it could abrogate Indian treaties when necessary to further the national interest.

## I

### THE NEGOTIATION AND INTERPRETATION OF INDIAN TREATIES

The law of Indian treaties and their abrogation is largely a reflection of the history of Indian affairs and, most particularly, of the treaty negotiation process.<sup>29</sup> An historical review thus will serve as a backdrop for the legal discussion to follow.

#### *A. The Negotiation Process*

Prior to 1815, Indians negotiated treaties from a position of some power, for the tribes had the option of allying with either the United

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28. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921).

29. "In disputes concerning American Indian tribes the courts have also considered and often decided cases principally on the basis of historical materials." C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 24 (1969). *See also* *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) (in interpreting Indian treaties, courts should "look beyond the written words to the history of the treaty").

States or the British.<sup>30</sup> The young American nation was most concerned with bare survival for many years; it needed the support of the Indians, or at least their assurances against hostility.<sup>31</sup> Thus the tribes were a power to be reckoned with.<sup>32</sup> As the Supreme Court expressed it: "[T]he early journals of Congress exhibit the most anxious desire to conciliate the Indian nations. . . . The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided."<sup>33</sup>

When the War of 1812 ended and the British withdrew from the Continent, the tribes lost much of their bargaining leverage. The negotiations became increasingly onesided.<sup>34</sup> After 1815, United States Indian policy became necessarily responsive to the westward expansion,<sup>35</sup> and treaties were used to remove the Indian tribes from the path of the ever-advancing white civilization.<sup>36</sup> From the Indians' point of view, it was a Hobson's choice. Theoretically, they could keep their land and be overrun by white settlers. Or, they could sell their land, their ancestral heritage,<sup>37</sup> and remove to a new site.<sup>38</sup> Certainly

30. S. MORISON, H. COMMAGER & W. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 362-65 (6th ed. 1969) [hereinafter cited as MORISON & COMMAGER]; see S. WISE, *THE RED MAN IN THE NEW WORLD DRAMA* 158-78 (V. Deloria, Jr., ed. 1971); Josephy, *Cornplanter, Can You Swim?*, 20 AM. HERITAGE 6-8 (1968) (account of the treaty negotiations with the Seneca in 1794).

31. B. DeVOTO, *THE COURSE OF EMPIRE* 335-36 (1952); G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS* 320-25 (1941) [hereinafter cited as HARMON].

32. W. HAGAN, *AMERICAN INDIANS* 63-65 (1961); W. MOHR, *FEDERAL INDIAN RELATIONS 1774-1788*, at 100 (1933); D. McNICKLE, *THE INDIAN TRIBES OF THE UNITED STATES* 28 (1962) [hereinafter cited as McNICKLE].

33. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

34. MORISON & COMMAGER, *supra* note 30, at 386; A. JOSEPHY, *THE INDIAN HERITAGE OF AMERICA* 98, 319 (1968); S. TYLER, *A HISTORY OF INDIAN POLICY* 48 (1973) [hereinafter cited as TYLER]; *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Cl. Ct. 1961), *cert. denied*, 369 U.S. 818 (1962). For an account of the ordeals of American Indians in the major post-1815 wars, see D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970). There was, of course, some pressure for land cession by the Indians even before 1815. HARMON, *supra* note 31, at 59-65; McNICKLE, *supra* note 32, at 31.

35. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 186-87* (1962). See also TYLER, *supra* note 34, at 48-50 (1973); *Choctaw Nation v. United States*, 119 U.S. 1, 37-38 (1886), where the Supreme Court recognized that removal of the Indians was one of the primary goals of the United States in executing the treaty. For an authoritative account of the force and inevitability of the westward expansion, see F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

36. *Choctaw Nation v. United States*, 119 U.S. 1, 37-38 (1886). See also J. FORBES, *THE INDIAN IN AMERICA'S PAST* 102-03 (1964) (statement of President Monroe); G. FOREMAN, *INDIAN REMOVAL* (1932); A. JOSEPHY, *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* 285-332 (abr. ed. 1971) [hereinafter cited as JOSEPHY, *THE NEZ PERCE INDIANS*].

37. "An Indian's land is his faith, his religion, the repository of the bones of his fathers, part of his own being—everything, save the lives of his people, that he holds most sacred." JOSEPHY, *THE NEZ PERCE INDIANS*, *supra* note 36, at 333.

no happy solution to such a dilemma could be found under the best of circumstances.

The results of treaty negotiations were almost always unsatisfactory to the Indians.<sup>39</sup> Friendly Indians were commonly selected as chiefs by federal officials and given power and prestige over tribes that had their own methods for selecting leaders.<sup>40</sup> Some treaties purported to bind Indian tribes not present at negotiations by the signatures of unauthorized head men who were unaware that their signatures would bind those tribes.<sup>41</sup> There are numerous accounts of threats, coercion, bribery, and outright fraud by the negotiators for the United States.<sup>42</sup> Given these factors, it is natural that the Indians generally felt ashamed and angry at the close of negotiations.<sup>43</sup>

Indian tribes at treaty negotiations also faced a language barrier. The Indian treaties were written only in English, making it a certainty that semantic and interpretational problems would arise.<sup>44</sup> When several Indian tribes were involved, the government negotiators would sometimes use a language they believed to be common to all tribes but which in fact carried different meanings to each.<sup>45</sup> The very serious

38. See generally FOREMAN, INDIAN REMOVAL 129-30 (1932); HARMON, *supra* note 31, at 230-35.

39. See A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 345 (1945) ("Half convinced and half compelled, they go to inhabit new deserts, where the importunate whites will not let them remain ten years in peace"); HARMON, *supra* note 31, at 361-67. See also JOSEPHY, THE NEZ PERCE INDIANS, *supra* note 36, at 285-332 (recounting Isaac Stevens' campaign with the Indians of the Pacific Northwest).

40. See W. BRANDON, THE LAST AMERICANS 274 (1974); W. HAGAN, AMERICAN INDIANS 55-56 (1961); A. JOSEPHY, THE INDIAN HERITAGE OF AMERICA 283-84 (1968). As Josephy points out, the notion of selecting leaders was antithetical to the cultures of many tribes, which did not repose such ultimate authority in any one man or small group of men. *Id.* See generally H. DRIVER, INDIANS OF NORTH AMERICA 325-52 (1961).

41. See JOSEPHY, THE NEZ PERCE INDIANS, *supra* note 36, at 329-39; MORISON & COMMAGER, *supra* note 30, at 440-41.

42. See G. FOREMAN, INDIAN REMOVAL 198, 236 (1932); W. HAGAN, AMERICAN INDIANS 55-56 (1961); HARMON, *supra* note 31, at 174, 188-91, 197, 361; MORISON & COMMAGER, *supra* note 30, at 439-40. Dishonest interpreters were often a problem. A. BLEDSOE, INDIAN WARS OF THE NORTHWEST 158-60 (1885). One of the more notorious examples is the Treaty of New Echota of 1835, discussed in HARMON, *supra* note 31, at 188-91, and in Harmon, *The North Carolina Cherokees and the New Echota Treaty of 1835*, 6 N.C. HIST. REV. 237-53 (1929). See also JOSEPHY, THE NEZ PERCE INDIANS, *supra* note 36, at 285-332. McNickle states that Andrew Jackson specifically authorized bribery in treaty negotiation with Indians. McNICKLE, *supra* note 32, at 39.

43. After negotiating with Isaac Stevens at Walla Walla, Indian leaders felt that Stevens had "dictated to them and hurried them along as if they were children." JOSEPHY, THE NEZ PERCE INDIANS, *supra* note 36, at 333. See also authorities at note 39 *supra*.

44. See L. SCHMECKEBEIR, THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES AND ORGANIZATION 59 (1927); *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) ("A great and unbridgeable void existed between the language and culture of the two races.").

45. See generally *Duwamish Indians v. United States*, 79 Ct. Cl. 530 (1934).

language problems have been emphasized by the Supreme Court:

[T]he negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; . . . the treaty is drawn up by them and in their own language; . . . the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . . .<sup>46</sup>

It is impossible to avoid the conclusion, therefore, that the young nation's ideals were often subservient to its ambitions when it came to honoring the solemn promises contained in the treaties.<sup>47</sup> Breach by the United States was common;<sup>48</sup> in one case a treaty was respected for only 12 days before it was violated by the government negotiator.<sup>49</sup>

In the Indian wars which usually followed, the Indian ranks were punished and debilitated by the United States Army. In turn, new rounds of treaties were negotiated.<sup>50</sup> The Supreme Court has accurately summarized Indian treaty negotiations during this period by concluding that "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent."<sup>51</sup>

46. *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

47. It is abundantly clear that the United States forced federal-Indian conflicts by its aggressive policy of westward expansion into Indian lands. *See, e.g.*, authorities cited in notes 34-39 *supra*. Nevertheless, the Supreme Court has correctly noted that the non-Indians were "not always the aggressors" in conflicts with the Indians. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823). In some instances, the Court of Claims was given jurisdiction to adjudicate claims arising from Indian depredations. Act of March 3, 1891, ch. 538, 26 Stat. 851. *See also* 25 U.S.C. § 229 (1970), which establishes a procedure for the settlement of some off-reservation depredations by Indians.

48. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 36. Where treaties were not violated by direct action, they were violated indirectly by allowing or encouraging white settlers to encroach on Indian lands. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 309-310 (1966); HARMON, *supra* note 31, at 363. This pattern is noted in MORISON & COM-MAGER, *supra* note 30, at 307: "[O]n 3 August 1795 the General signed his name, and the Chieftains their marks, to the Treaty of Greenville. . . . Pioneers began to swarm up the valleys . . . and in ten years' time their insatiable greed for land made the Treaty of Greenville a mere scrap of paper."

49. Isaac Stevens stayed at the council site at Walla Walla after a treaty with several bands of Northwest Indians had been signed and wrote reports which opened up ceded Indian lands for immediate white settlement—an express violation of the terms of the treaty. JOSEPHY, *THE NEZ PERCE INDIANS*, *supra* note 36, at 337-38.

50. *See id.* at 333 *passim*.

51. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970). In McClanahan

To some extent, the practices can be rationalized—at least legally—by the right of conquest or discovery.<sup>52</sup> Nevertheless, Indian treaties were legally binding agreements between real parties. They were agreements that the American Indians rightfully expected to be upheld.<sup>53</sup> Moreover, the rhetorical questions of Chief Justice John Marshall make it clear that the United States received a very real quid pro quo in every Indian treaty:

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were not at least as anxious to receive it as the [Indians]?<sup>54</sup>

In 1871 Congress passed legislation which brought treaty-making with Indian tribes to an end. The legislation declared that no Indian tribe was to be acknowledged as an independent nation with whom the United States could contract by treaty.<sup>55</sup> While not intended to impair existing treaties, the legislation expressed the House's dissatisfaction with the Senate's exclusive right to advise and consent on all treaties.<sup>56</sup>

### *B. The Trust Relationship Between the United States and American Indians*

Judicial interpretation of Indian treaties has resulted in a legal relationship and a body of law which are truly sui generis. The first

v. State Tax Comm'n, 411 U.S. 164 (1973), the Court cautioned that the Navajo Treaty "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." *Id.* at 174. Cohen also refers to the "practical inequality of the parties." COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 41.

52. For a lengthy discussion of the right of conquest or discovery, see the opinion of Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-92 (1823).

53. Today, Indians continue to expect treaty promises to be honored. On the reservation, treaties are spoken of with a reverence that is equalled only by discussions of tribal sovereignty. In addition, a leading contemporary writer on Indian affairs has made this point:

Behind Alcatraz, the occupation of numerous federal lands, the occupation of the Bureau of Indian Affairs headquarters in 1972 and Wounded Knee 1973 stands this unresolved treaty issue. Most of the complaints of Indians today go to the portions of the treaties where the government promised it would abide by specific provisions or that it would do certain things. The failure of the United States to perform according to treaty has meant generations of resentful Indians waiting for that spark of protest to burst into a national flame. And we have finally, in the past year, seen that resentment burst into open warfare with the United States.

Deloria, *Indian Treaties A Hundred Years Later*, 5 RACE REL. REP., March 1974, at 29, 30.

54. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551 (1832).

55. See 25 U.S.C. § 71 (1963).

56. U.S. CONST. art. II, § 2, cl. 8. See F. WALKER, *THE INDIAN QUESTION* 5 (1974); L. SCHMECKEBIER, *THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 55-58 (1927).

judicial analysis of the legal impact of Indian treaties was in *Cherokee Nation v. Georgia*,<sup>57</sup> an original action in the United States Supreme Court seeking to enjoin the operation of "certain laws" of the State of Georgia on Cherokee land.<sup>58</sup> The Cherokee Nation asserted that the Supreme Court had original jurisdiction pursuant to article 3, section 2 of the United States Constitution—governing controversies "between a state . . . and foreign states"—on the premise that it was a "foreign state" within the meaning of the Constitution.<sup>59</sup>

The Court's opinion, written by Chief Justice John Marshall, held there was no original jurisdiction because the Cherokee Nation was not a "foreign state." In so ruling, however, he laid down principles that are still at the core of federal-Indian relationships.<sup>60</sup> Chief Justice Marshall reasoned that Indian tribes were not nations in the international sense, but rather "domestic dependent nations."<sup>61</sup> Furthermore, he noted that tribes "look to our government for protection," resulting in a relationship between the United States and Indian tribes "resembl[ing] that of a ward to his guardian."<sup>62</sup> This was the first judicial formulation of the trust relationship between the United States and the American Indians.

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57. 30 U.S. (5 Pet.) 1 (1831).

58. *Id.* at 15. The opinion does not discuss the specific statutes which were involved.

59. *Id.*

60. Thus the process of rendering the decision was similar to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall also held that the Court did not have jurisdiction, but established the basic constitutional law principle of judicial review. Such judicial indirection was necessary at the time of *Marbury* because the authority of the Supreme Court was still very much an open question. There was every chance that President Jefferson's administration would refuse to comply with a writ directing Secretary of State Madison to deliver Marbury's commission. B. HENDRICK, *BULWARK OF THE REPUBLIC: A BIOGRAPHY OF THE CONSTITUTION* 183-84 (1937); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 264-66 (1923). A similarly emotional atmosphere existed in regard to the jurisdictional dispute between the Cherokee Nation and the State of Georgia. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 54-55; TYLER, *supra* note 34, at 56-59. The leading historian on the Court has called the Cherokee issue "the most serious crisis in the history of the Court." 2 C. WARREN, *supra*, at 189. The jurisdictional ruling in *Cherokee Nation* permitted Chief Justice Marshall to set forth important legal principles while, at the same time, rendering no affirmative order; because there was no order to enforce there was no order to disobey. The situation was different in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where the Court, in another Marshall opinion, overturned two Georgia state indictments on the ground that the state did not have jurisdiction on Cherokee land. The Court's order was never enforced. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 123; TYLER, *supra* note 34, at 59. It was the order in *Worcester* which prompted President Jackson's famous statement that "John Marshall has made his decision; now let him enforce it." See H. GREELEY, *AMERICAN CONFLICT* 106 (1864). The quotation attributed to Jackson may be apochryphal. See M. JAMES, *THE LIFE OF ANDREW JACKSON* 603-04 (1938); 2 C. WARREN, *supra*, at 205-06.

61. 30 U.S. (5 Pet.) at 17.

62. *Id.*

The courts have since expanded this notion of the trust relationship set forth by the Chief Justice. As is the case with no other race,<sup>63</sup> the United States has a "special"<sup>64</sup> duty of protection in regard to Indians.<sup>65</sup> These duties, exercised in conjunction with the broad power of Congress over Indian affairs, have been characterized as "moral obligations of the highest responsibility and trust."<sup>66</sup>

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63. When faced with claims of racial discrimination against non-Indians, the courts have approved the practice of dealing specially with Indians as a race. In *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974), the Court upheld the Bureau of Indian Affairs' hiring preference for Indians, stating that it is no basis for objection that such legislation "single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 552. As the opinion pointed out, "If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* See also *Simmions v. Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge panel), *aff'd*, 384 U.S. 209 (1966) ("[I]f legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race'. Indians can only be defined by their race."). See also Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 530-50 (1973) (dealing specially with Indians in the field of education).

64. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974); *United States v. Sandoval*, 231 U.S. 28, 39 (1913); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966).

65. See, e.g., *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886); *United States v. Kagama*, 118 U.S. 375, 384 (1886).

66. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), *relied upon in* *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973). The power of Congress over Indian affairs is of immense scope—so broad that it is described as "plenary." E.g., *Winton v. Amos*, 255 U.S. 373, 391-92 (1921); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899); COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 95-96. The leading case to discuss the plenary power of Congress is *Warren Trading Post v. State Tax Comm'n*, 380 U.S. 685 (1965). The administration of this power has largely been delegated to the Bureau of Indian Affairs. See COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 101. Although Indians are now mentioned expressly only three times in the Constitution, U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 8; *id.* amend. XIV, § 2, it is accurate to conclude that the Constitution accords Congress an implied power to regulate Indians. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 80-81 (1934). In discussing the source of federal power over Indian affairs, the Supreme Court recently noted: "[I]t is now generally recognized that the power derives from federal responsibility for regulating Commerce with Indian tribes and for treaty making." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (citations omitted). See also *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *Morton v. Mancari*, 417 U.S. 535 (1974).

The Nation's power over Indian affairs extends to "all dependent Indian communities within its borders." *United States v. Sandoval*, 321 U.S. 28, 46 (1913). See *United States v. Ramsey*, 271 U.S. 467, 471 (1926); *United States v. Candelaria*, 271 U.S. 432, 439 (1926). Thus there are several instances in which Indian land was freed of all federal restrictions and where courts upheld the subsequent reimposition of restrictions by the federal government. See, e.g., *McCurdy v. United States*, 246 U.S. 263 (1918); *Hickey v. United States*, 64 F.2d 628 (10th Cir. 1933); *United States v. Hughes*, 6 F. Supp. 972 (N.D. Okla. 1934). An historical example of the resumption of the trust

Treaties are not the only method by which the trust relationship and reservation status can be created. Four additional methods have been employed: executive orders,<sup>67</sup> agreements,<sup>68</sup> statutes,<sup>69</sup> and withdrawals by the Secretary of the Interior.<sup>70</sup> The validity of these

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relationship is the Wyandotte Tribe, which was "dissolved and terminated," Act of Jan. 31, 1885, 10 Stat. 1159 (codified at 25 U.S.C. §§ 791-807 (1970)), but later restored to federal status. See *Conley v. Ballinger*, 216 U.S. 84, 90 (1910); *Schrimscher v. Stockton*, 183 U.S. 290 (1901). This issue is of current importance because of the restoration of the Menominee Tribe of Wisconsin to full federal status. See 25 U.S.C. § 903 (Supp. III, 1973). Presumably other tribes will seek to achieve federal recognition by congressional act, as did the Menominee, or by secretarial directive. See note 70 *infra*.

The depth and breadth of the power of Congress is exemplified by the fact that no court has ever held any congressional regulation of Indians to be outside the limits of federal power. Rice, *supra*, at 81. Rice reached this conclusion in 1934, and the authors have discovered no case since that date in which any federal regulation of Indians has been overturned. This fact is all the more significant when one considers the highly complex matrix of regulatory controls the federal government has imposed on American Indians, who are undoubtedly the most highly regulated group in our society. See Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 TOLEDO L. REV. 647, 691 ("no other American comes within the sweep of as many laws as the Indian living on a reservation"); Price, *Lawyers on Reservations*, 1969 LAW & SOCIAL ORDER 161, 163.

As long ago as 1942, there were no fewer than 4,264 statutes, 389 treaties, 1,725 reported cases, 523 Attorney General's opinions, 838 opinions of the Interior Solicitor, along with numerous other miscellaneous laws and rulings. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at V [Explanation of Reference Tables and Index]. Those figures have, of course, burgeoned since then. Title 25 of the United States Code is now devoted entirely to Indians, and many other relevant provisions are codified in other titles. Similarly, title 25 of the Code of Federal Regulations deals solely with regulation of Indians, with relevant provisions also to be found in many other titles. The *Bureau of Indian Affairs Manual*, which sets out the internal procedures of the Bureau of Indian Affairs, fills some six feet of shelf space. The Court thus was not exaggerating when it described the federal-Indian relationship as "unique." *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974). See also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831), where the Court concluded that "[t]he condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence . . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."

67. See, e.g., COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 299-302.

68. *Id.* at 67. Agreements have much in common with treaties; they are negotiated with tribes by federal officials, but have the sanction of both houses of Congress, rather than just the Senate. Like treaties, congressionally ratified agreements become the supreme law of the land. *Antoine v. Washington*, 43 U.S.L.W. 4257, 4261 (U.S. Feb. 19, 1975).

69. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 296-99.

70. There are at least two kinds of withdrawals by the Secretary of Interior. First, the Secretary is authorized to designate reservations in Alaska without subsequent statutory ratification. 25 U.S.C. § 496 (1970). Second, the Secretary has made temporary withdrawals which were later ratified by statute. The Chemehuevi Reservation in Arizona was established by this method. *Arizona v. California*, 373 U.S. 546, 596 n.100 (1963). See also Act of May 21, 1926, ch. 357, 44 Stat. 614; Act of June 1,



methods is well established<sup>71</sup> and all, with the exception of treaties and executive orders,<sup>72</sup> may still be employed. The same standards of construction that are applied to treaties have been applied to executive orders, statutes, agreements and secretarial withdrawal.<sup>73</sup> Thus the rule has developed that the specific method of setting land aside for tribes is not determinative; the test is whether it was intended that a reservation be established—set apart for the use of Indians—and, if

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1926, ch. 434, 44 Stat. 679. There may be a third method of secretarial withdrawals for the purpose of creating new federally recognized reservations. The Secretary is authorized to accept land in trust for tribes, whether "within or without existing reservations." 25 U.S.C. § 465 (1970). The Secretary is also authorized to "proclaim new Indian reservations on lands acquired pursuant to" sections 461-64 and 466-70 of Title 25. 25 U.S.C. § 467 (1970). These two sections would seem to permit the acceptance of a new reservation in trust. But see 43 U.S.C. § 150 (1970), which provides that "[n]o public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation, except by Act of Congress." This statute would, at the least, restrict the acceptance of "public lands," but whether the statute negates any of the authority apparently granted by sections 465 and 467 is a question which will have to be resolved by the courts. It should be noted that the Secretary's authority to recognize tribes, for the purpose of receiving federal benefits, is well established. 25 U.S.C. § 467 (1970); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *OPINION OF THE INTERIOR SOLICITOR* No. M-36759, Nov. 16, 1967 (Status of Burns Paiute Indians as a Recognized Band or Tribe of Indians); *OPINION OF THE INTERIOR SOLICITOR* No. M-36833, Aug. 13, 1971 (Status of Nooksack Indians Under the Reorganization Act).

In its most recent report, the Bureau of Indian Affairs reports that 50,410,053.58 acres of Indian land are now in trust. BUREAU OF INDIAN AFFAIRS, OFFICE OF ECONOMIC DEVELOPMENT, INDIAN LANDS 1 (1971). There has apparently been no breakdown of the total since 1953. At that time, approximately 9.5 million of the approximately 43 million acres of land held in trust for Indians were on treaty reservations and about 23 million acres were on executive order reservations. H.R. REP. NO. 2503, 82d Cong., 2d Sess. 60-74 (1953). Other kinds of reservations accounted for the remaining 10.5 million acres. *Id.*

71. *E.g.*, *Arizona v. California*, 373 U.S. 546, 596 n.100 (1963) (temporary withdrawal by Secretary with subsequent statutory approval); *United States v. McGowan*, 302 U.S. 535 (1938) (statutory reservation); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (executive order reservation); *Dick v. United States*, 208 U.S. 340 (1908) (reservation by agreement). In *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 100-01 (1949), the Court declined to rule upon the validity of Alaska reservations established by the Secretary pursuant to statutory authority, 25 U.S.C. § 496 (1970), because the issue was not raised at the trial level, but there is no reason to doubt the validity of such reservations. This is particularly true because the courts have treated reservations as being validly established if congressional intent to establish a reservation can be shown. See authorities cited at note 74 *infra*. The broad delegation of authority under section 496 would seem to be ample evidence of such a purpose.

72. The practice of establishing reservations by executive order was terminated in 1919. Act of June 30, 1919, § 27, 41 Stat. 3. The creation of reservations by treaty has also been banned. See note 55 *supra*.

73. See, *e.g.*, *Arizona v. California*, 373 U.S. 546, 596 n.100, 598 (1963) (executive order reservations and temporary secretarial withdrawals); *Choate v. Trapp*, 224 U.S. 665 (1912) (agreement); *Winters v. United States*, 207 U.S. 564 (1908) (agreement); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939) (executive order reservation).

such intent existed, the special rules of construction and other Indian law principles are applicable.<sup>74</sup> This Article will deal only with treaty reservations, primarily because most of the case law and historical research is in that area. Existing cases, however, give no indication that different legal principles will apply to reservations created by other means.

### C. *The Interpretation of Rights in Indian Treaties*

The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality. Although many treaty rights are clearly expressed in Indian treaties,<sup>75</sup> others are not. The courts have been liberal in recognizing the existence of Indian treaty rights in those instances when they are not clearly stated in the treaty. Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned;<sup>76</sup> Indian treaties must be interpreted as the Indians themselves would have understood them;<sup>77</sup> and Indian treaties must be liberally construed in favor of the Indians.<sup>78</sup> Thus the construction of Indian treaties is akin to the construction of adhesion contracts, in that Indian treaties, like adhesion contracts, are liberally construed in favor of the weaker party, and their terms are given the meaning attached to them by laymen unversed in the law. The goal is to achieve the reasonable expectations

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74. Coheu puts it best by stating that there is no "magic" in the word reservation, but that the intent of Congress is paramount in establishing a reservation by statute. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 297. See also *Arizona v. California*, 373 U.S. 546 (1963): "Congress and the Executive have ever since recognized these [executive order and secretarial withdrawal reservations] as Indian reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public." *Id.* at 598.

Executive order reservations do differ in one important respect: takings of land from them are, or at least were, non-compensable. See *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (dictum); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Healing v. Jones*, 174 F. Supp. 211 (D. Ariz. 1959) (dictum). One commentator has concluded that the Court of Claims now has jurisdiction for takings of land in executive order reservations after 1946. Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960).

75. See, e.g., treaty provisions cited at notes 1, 2, 4-7 *supra*.

76. See, e.g., *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

77. See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

78. See, e.g., *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

of the weaker party.<sup>79</sup> Many principles of trust law are also applicable.<sup>80</sup>

The courts have put teeth into these rules of construction. For example, the Supreme Court concluded that the treaty phrase "to be held as Indian lands are held" also reserved hunting and fishing rights to the Indians.<sup>81</sup> In construing treaty language reserving to the Indians the right to fish at "usual and accustomed places" on lands relinquished to the United States, it held that the language included an easement to cross over these lands to reach traditional fishing grounds, even after they had become privately settled by whites.<sup>82</sup> Recently, the Court found that general provisions in the Navajo Treaty of 1868, which set aside the reservation "for the use and occupation of the Navajo tribe of Indians" and provided for the exclusion of non-Navajos from the reservation, must be construed as excluding the operation of state laws, including state tax laws, upon Indians living on the reservation.<sup>83</sup>

In the area of water rights, the Court has developed the so-called *Winters* doctrine<sup>84</sup> which provides that implicit in Indian treaties is the

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79. Adhesion contracts are contracts, usually standardized, imposed upon one party by another who is in a superior bargaining position. For a leading discussion of this doctrine, see *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269-75, 419 P.2d 168, 171-75, 54 Cal. Rptr. 104, 107-11 (1966). See also *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135-36 (4th Cir. 1967); *Standard Oil Co. v. Perkins*, 347 F.2d 379, 383 (9th Cir. 1965); Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629 (1943); Lenhoff, *Contracts of Adhesion and the Freedom of Contract*, 36 TUL. L. REV. 481 (1962).

80. *Seminole Nation v. United States*, 316 U.S. 286 (1942), is a good example of the application of trust law to Indian matters. In *Seminole*, Federal officials disbursed trust funds, intended for individual tribal members, to a tribal council which was legally constituted in all respects. The funds were then misappropriated by the tribal council. The Court remanded for a determination as to whether the tribal council was "corrupt, venal, and false to its trust" and, if so, whether the Department of Indian Affairs was on notice of such facts before the disbursement. *Id.* at 300. The Court, citing trust cases and authorities, *id.* at 296-97, found that such facts, if true, would establish liability for breach of trust by the United States. For other examples of the use of trust law, see *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

81. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968). See also *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974), finding that the treaty phrase "set apart as a residence for said Indians, [and] held and regarded as an Indian reservation" includes hunting, fishing and trapping rights.

82. *United States v. Winans*, 198 U.S. 371, 381 (1905). See also *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919).

83. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174-75 (1973).

84. This doctrine developed from *Winters v. United States*, 207 U.S. 564 (1908), which involved a reservation established by agreement, not by treaty. Nevertheless, the *Winters* doctrine has since been analyzed as arising from treaty guarantees. See COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 316-17; *Conrad Inv. Co. v. United States*, 161 F. 829, 831-32 (9th Cir. 1908); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 336 (9th Cir. 1939); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 325 (9th

reservation of sufficient waters, from streams on and bordering reservations, to fulfill the purposes of establishing the reservation, including irrigation for agriculture. Furthermore, the doctrine provides that Indian water rights date from the establishment of the reservation and are prior and paramount to any other rights subsequently established pursuant to state law. The *Winters* doctrine is essential to the protection of tribal water rights in Western "prior appropriation" states<sup>85</sup> because it establishes an early appropriation date (the date on which the reservation was created) as well as a liberal quantity of reserved water (including the future needs of the reservation).<sup>86</sup>

Of even greater significance is the doctrine that Indian treaties were not a grant of rights to tribes, but rather a grant of rights from them. In other words, all powers of tribes, as sovereign nations, were retained unless granted by the tribe pursuant to treaty or taken from the tribe by federal statute.<sup>87</sup> This "reserved rights" doctrine has been described as "perhaps the most basic principle of all Indian law."<sup>88</sup>

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Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). Possibly the confusion arose because the crucial phrase in the agreement involved in *Winters*, providing that the lands were to be held "as an Indian reservation as and for a permanent home and abiding place . . .," was similar to language typically employed in treaties. See, e.g., Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165, 1166 ("a sufficient quantity of land for the permanent homes of the said Indians"); Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478 ("with a view to . . . securing a permanent home for themselves and their posterity"); Treaty with the Cherokees, May 6, 1828, 7 Stat. 311 ("to secure to the Cherokee nation of Indians . . . a permanent home, and which shall . . . be, and remain, theirs forever"). Thus *Winters* rights were first enumerated in a non-treaty case but have since been implied in treaties.

85. The "prior appropriation" doctrine, which prevails in most Western states, provides that "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona v. California*, 373 U.S. 546, 555 (1963). The leading cases on the development of Western water law include *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Lux v. Haggan*, 69 Cal. 255, 10 P. 674 (1886); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

86. See *Arizona v. California*, 373 U.S. 546, 599-600 (1963).

87. The first, and classic, analysis of the fact that Indian tribes did not "surrender [their] independence—[their] right to self-government" is found in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-61 (1832), discussed at note 60 *supra*. The Court has since described *Worcester* as "one of [Chief Justice Marshall's] most courageous and eloquent opinions." *Williams v. Lee*, 358 U.S. 217, 219 (1959). For other cases recognizing the reserved sovereignty of Indian tribes, see, e.g., *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974); *FPC v. Oregon*, 349 U.S. 435, 444 (1955); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

88. COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 122. Cohen described the "reserved rights" doctrine this way:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses . . . all powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, . . . but

Thus, just as the Court has directed an expansive interpretation of rights granted by treaties, it has afforded tribes protection in regard to matters not the explicit subject of the treaties.

### D. *The Analogy to International Treaties*

These historical and legal factors make it impossible to draw a direct analogy between Indian treaties and international treaties. The United States and Indian tribes were almost never in equal negotiating positions,<sup>89</sup> while many international treaties are negotiated between parties of comparable strength.<sup>90</sup> The lack of skilled interpreters and the failure to translate the treaty into the language of both parties, situations which existed in regard to most Indian treaties,<sup>91</sup> are factors which are almost never present in the international context.<sup>92</sup> The trust relationship created by all Indian treaties<sup>93</sup> is also a relative rarity in the international field.<sup>94</sup> Similarly, the special rules of construction

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does not by itself affect the internal sovereignty of the tribe, *i.e.* its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

*Id.* at 123.

89. See text accompanying notes 30-56 *supra*.

90. J. FOSTER, *A CENTURY OF AMERICAN POLICY* 1 (1901). After 1815, for example, the relative strength of the United States was far greater in regard to the Indian tribes than in regard to its primary international rivals. Compare text accompanying notes 34-52 *supra* with B. DEVOTO, *THE YEAR OF DECISION—1846*, at 5-6 (1943), and F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 219 (1920). Obviously, many international treaties have also been negotiated between parties of enormously unequal strength. See, *e.g.*, J. BRIERLY, *THE LAW OF NATIONS* 130-33 (6th ed. 1963); C. EAGLETON, *INTERNATIONAL GOVERNMENT* 85-86 (3rd ed. 1957).

91. See text accompanying notes 44-46 *supra*.

92. For discussions of the highly formal protocol which has developed in regard to the negotiation of international treaties, see 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 25-74 (1943); J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 346-63 (6th ed. 1967). During the era of the negotiation of Indian treaties, international treaties were often prepared in French, which was then considered the official international language. Translations were then made in the languages of any parties which did not use French as a national language. Customarily, duplicate originals were prepared in a form referred to as an *alternat*, with parallel vertical columns containing the two languages side-by-side. See, 5 G. HACKWORTH, *supra*, at 26; G. DAVIS, *ELEMENTS OF INTERNATIONAL LAW* 233-34 (4th ed. 1916). In modern times English, as well as French, is commonly used as the official language in treaties and the *alternat* technique is not always employed. 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 32-34 (1970).

93. See notes 58-67 *supra* and accompanying text.

94. Trust territory, colonies, and protectorates have been established, sometimes by treaty, in the international field, but their legal characteristics vary. J. BRIERLY, *THE LAW OF NATIONS* 133-37, 173-89 (6th ed. 1963); 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 430-76 (1963). The United Nations maintains the International Trusteeship System. U.N. CHARTER, ch. XII, art. 75-85. The United States still administers

which have been developed in regard to Indian treaties<sup>95</sup> are not employed in interpreting international treaties.<sup>96</sup> The courts seem to recognize these distinctions when construing treaty rights, although the issue has not often been discussed.<sup>97</sup>

International treaty cases have also been treated differently than Indian treaty cases when the question of abrogation of treaty rights has arisen. The international treaty cases seem adapted to giving the United States as free a hand as possible in foreign affairs.<sup>98</sup> In the

the Trust Territory of the Pacific Islands, commonly known as Micronesia. 1 M. WHITEMAN, *supra*, at 769-839.

95. See notes 76-79 *supra* and accompanying text.

96. Most authorities speak in terms of interpreting international treaties in order to obtain the intent of the parties; if the language of the treaty is ambiguous, the court will determine intent by reference to objective indicia, such as history, surrounding circumstances, and custom. See generally A. McNAIR, *LAW OF TREATIES* 364-65 (1961); 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 353-410 (1970); Hyde, *The Interpretation of Treaties by the Supreme Court of the United States*, 23 AM. J. INT'L L. 824 (1929). Thus normal contract principles are applied. See *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912). The interpretation of international treaties has also been compared to the interpretation of statutes. *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 146, comment *a* at 449-50 (1965).

97. The primary authority for the distinction between the two types of treaties is the case of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where the Court held that Indian nations are "domestic dependent nations," and not "foreign states" within the meaning of the Constitution. See notes 57-61 *supra* and accompanying text. Chief Justice Marshall reasoned:

The term "foreign nation" is, with strict propriety, applicable [with respect to the United States and Indian tribes] . . . . But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

*Id.* at 16. Recently, the Wisconsin Supreme Court noted that the United States Supreme Court "has developed a set of rules specifically relating to Indian treaties . . . . [An Indian treaty] raises completely different problems than a treaty between the United States and a foreign sovereign which has no ties to the state . . . ." *State v. Gurnoe*, 53 Wis. 2d 390, 400, 192 N.W.2d 892, 897 (1972). One older case, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871), indicates that Indian treaties and international treaties are to be treated the same, but that analysis would appear to be inconsistent with *Cherokee Nation* and the several cases setting forth the rules of construction which are unique to Indian treaties. See notes 76-78 *supra* and accompanying text.

98. This policy is manifest in the courts' cautious approach to judicial rulemaking in the field of international affairs. In finding that a declaration of war does not automatically abrogate all treaties with the opposing nation, Justice Cardozo, writing for the Court of Appeals of New York, emphasized that practical foreign policy considerations are paramount when ruling on international law issues: "International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but does not fetter itself with rules." *Techt v. Hughes*, 229 N.Y. 222, 241, 128 N.E. 185, 191 (1920), *approved in* *Clark v. Allen*, 331 U.S. 503, 509-10 (1947). The policy is also evident in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821), in which the Court emphasized the primacy of the President and the Congress in international affairs:

In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government;

majority of international treaty cases, the courts have held that a later enactment which is inconsistent with a prior treaty acts as an implied abrogation.<sup>99</sup> Only a few international treaty cases hold differently, and they appear to have been decided upon the basis of their unique facts.<sup>100</sup> With respect to Indian treaties, the courts have been much less willing to imply abrogations. Even when faced with an apparent conflict between the Indian treaty and a subsequent statute, the courts have almost always sought to determine whether Congress intended to abrogate the treaty.<sup>101</sup> This protection given to Indian treaties is appropriate in light of the federal-Indian trust relationship<sup>102</sup> and of the circumstances in which the treaties were made.<sup>103</sup> These considerations indicate that international treaties are different from Indian treaties and must be treated differently,<sup>104</sup> a conclusion buttressed by

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and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty.

*Id.* at 71; *cf.* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936).

99. In most international cases, the "later in time" rule is strictly applied when the subsequent statute conflicts with the treaty. *See, e.g.,* *Horner v. United States*, 143 U.S. 570 (1892); *Whitney v. Robertson*, 124 U.S. 190 (1888). This is especially true where contact with foreign nations or citizens is either specifically or implicitly involved in the legislation. *See Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (both involving the entry of Chinese workers into the United States); *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959) (involving an alien's right to receive personal property under the will of an American citizen); *Minerva Automobiles, Inc. v. United States*, 96 F.2d 836 (C.C.P.A. 1938) (involving taxation of imported goods); *United States v. Gredzens*, 125 F. Supp. 867 (D. Minn. 1954); *Ex parte Larrucea*, 249 F. 981 (S.D. Cal. 1917) (both involving conscription of aliens). *See generally* 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 185-98 (1943).

100. These have been cases where the subject matter of a potential conflict is especially delicate, *Cook v. United States*, 288 U.S. 102 (1933); where the treaty constitutes a significant innovation in foreign policy, *John T. Bill Co. v. United States*, 104 F.2d 67 (C.C.P.A. 1939); where the conflict would involve the breach of a basic principle of international comity, *The Over the Top*, 5 F.2d 838 (D. Conn. 1925); or where the political arms of both parties to the treaty appear to have adjusted their differences in spite of the apparent conflict between statute and treaty, *Pigeon River Co. v. Cox Co.*, 291 U.S. 138 (1934). There is also a case in which the treaty-statute conflict involved a "mistake" in the statute intended to effectuate the treaty. *Chew Heong v. United States*, 112 U.S. 536 (1884). These cases are the exceptions, however, and do not detract from the general rule that the latest enactment in time governs.

101. *See* section IIA *infra*.

102. *See* section IB *supra*.

103. *See* section IA *supra*.

104. Although it appears that no authority has comprehensively examined the differences between the law in these two areas, this conclusion seems fair. Thus the court in *People v. Jondreau*, 384 Mich. 539, 546, 185 N.W.2d 375, 379 (1971), was correct in finding that recent Indian cases "do demonstrate a decisive trend in the decisions of the Federal Courts toward granting Indians expanded rights under the various treaties." *See also* *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972). The authors do not believe that similar statements could be made in regard to international treaties.

the Supreme Court's early recognition that the Constitution clearly "contradistinguishes" between Indian tribes and foreign nations.<sup>105</sup>

## II

### THE EXISTING LAW ON ABROGATION OF INDIAN TREATY RIGHTS

With both international<sup>106</sup> and Indian<sup>107</sup> treaties, the general rule is that, in the absence of congressional expression to the contrary, the later in time governs a conflict between a treaty and a statute. This rule, however, resolves few cases: the bulk of the analysis revolves around the question of whether a "conflict" actually exists—that is, whether Congress intended an abrogation. In making this determination, the courts typically turn to the legislative history; in analyzing the intent of Congress in Indian treaty cases, the courts have used several different tests. This section will first enumerate the various tests; it will then explore their application in recent cases.

#### A. Judicial Tests

##### 1. *Abrogation Only Upon a "Clear Showing" of Legislative Intent*

One of the most common formulations is that a "clear showing of legislative intent" must be made to support a claim that congressional action has abrogated an Indian treaty. Since this test does not require an express statutory statement that Indian treaties are to be ignored, it can open up the vast area of legislative intent.

*United States v. Santa Fe Pacific Railroad Company*,<sup>108</sup> decided in 1941, was one of the first cases to establish this "clear showing" rule. The United States, in its own right and as guardian of the Walapai Indians, sued to enjoin the defendant from interfering with the Walapai right to possession of certain lands. Santa Fe claimed title to the land in question by conveyance from its predecessor, which had claimed under a legislative grant.<sup>109</sup> A major issue was whether the Indian title to the land had in fact been extinguished by the United States prior to the time that the railroad company took the land; if not, the company obtained the land subject to the Indian right of occupancy. The company argued that Congress had extinguished Walapai title by

105. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12, 13 (1831).

106. *Fong Yue Ting v. United States*, 149 U.S. 698, 720-21 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Ex parte Larrucea*, 249 F. 981, 983 (S.D. Cal. 1917).

107. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Thomas v. Gay*, 169 U.S. 264, 271 (1898); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); cf. *Ward v. Race Horse*, 163 U.S. 504 (1896).

108. 314 U.S. 339 (1941).

109. Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292, 294.



establishing a reservation for them in another area which excluded this land.<sup>110</sup> The Supreme Court concluded that there was no "clear and plain" congressional action and that the Walapai right to possession in the disputed area therefore survived.<sup>111</sup> Another example is *United States v. 5,677.94 Acres of Land* (the *Crow* case),<sup>112</sup> where the court found sufficient indication of congressional intent to condemn Indian land for flood control based on: (1) a construction of the Federal Reclamation Laws<sup>113</sup> which held that condemnation authority for reclamation projects governed thereby must necessarily extend to land in Indian reservations;<sup>114</sup> and (2) an interpretation of a series of appropriation bills for preconstruction work on the project for which condemnation was sought.<sup>115</sup> The first court to reconsider the case<sup>116</sup> arrived at the same conclusion after a careful reading of the legislative history, including a Senate committee report which recommended negotiation between the Interior Department and the Indians on the question of compensation.<sup>117</sup>

This "clear showing" rule has been applied or referred to in several other cases.<sup>118</sup> Under this test, an apparent conflict between a

110. Act of Mar. 3, 1865, ch. 127, § 1, 13 Stat. 541, 559.

111. 314 U.S. 339, 353 (1941). Technically *Santa Fe* is not a treaty case, because the Walapai right of occupancy was aboriginal, not treaty-based. The Court, however, treated the right of aboriginal possession as similar to a treaty right, *id.* at 346-47, and subsequent cases have cited the *Santa Fe* test in treaty contexts. See, e.g., *Bennett County v. United States*, 394 F.2d 8, 12 (8th Cir. 1968); *cf. Plamondon ex rel. Cowlitz Tribe v. United States*, 467 F.2d 935, 937 (Ct. Cl. 1972); *Otoe & Missouri Tribe of Indians v. United States*, 131 F. Supp. 265, 285 (Ct. Cl. 1955).

112. 152 F. Supp. 861 (D. Mont. 1957).

113. 43 U.S.C. §§ 371 *et seq.* (1964).

114. 152 F. Supp. at 863, *citing* *Henkel v. United States*, 237 U.S. 43 (1914).

115. *Id.* at 862-63.

116. *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont. 1958).

117. *Id.* at 110-11.

118. *Nicodemus v. Washington Power Co.*, 264 F.2d 614 (9th Cir. 1959), found that the "manifest intent" of Congress was to allow condemnation of land allotted in severalty to the Indians as the legislation involved there expressly authorized such condemnation. The statute in that case provided:

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357 (1970). Thus *Nicodemus* unquestionably presented a "clear showing" of congressional intent to permit abrogation of the rights of Indians in former reservation land held in virtual fee. For other examples of cases requiring a strong showing of congressional intent, see *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (requiring a "definite expression of intention [to abrogate]"); *Bennett County v. United States*, 394 F.2d 8, 11-12 (8th Cir. 1968) (intent to abrogate must be "clearly and unequivocally stated"); *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 196 (D.S.D. 1958), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958). The latter case explained that the *Santa Fe* doctrine requires that Congress have in mind "the specific situation" of particular Indian

treaty and a subsequent statute is insufficient to establish an abrogation. *Santa Fe* and the cases following it establish the more exacting standard that there must be a "clear and unambiguous" showing of legislative intent to abrogate.

## 2. Abrogation "Not Lightly Implied"

Another test used by the courts is that abrogation of Indian treaties will "not lightly be implied."<sup>119</sup> This rule appears to have been borrowed, without analysis, from the body of law dealing with the abrogation of international treaties.<sup>120</sup> There are important logical differences between the "not lightly implied" and the "clear showing" rules. The "clear showing" rule directs that normal rules of statutory interpretation do not apply. A "fair" or "reasonable" showing of intent to abrogate is not sufficient because the legislative history must be "clear" or "unambiguous." The "not lightly implied" test is weaker. In effect, it directs only that the court may not liberally construe in favor of abrogation. Unlike the "clear showing" rule, the "not lightly implied" test would seem to permit a revocation upon a "fair" or "reasonable" showing, although there is nothing inherent in the test to indicate how strong that showing should be. Thus, in theory, the "clear showing" test appears to be weighted in favor of treaty rights while the "not lightly implied" test is neutral.

The logical differences between the "clear showing" and the "not lightly implied" tests have not been reflected in the cases.<sup>121</sup> At least part of the confusion derives from the fact that neither test specifically defines the requisite level of congressional intent—both call for a show-

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lands in any abrogating legislation; at the least, the abrogating legislation must apply to Indian lands in general. *Id.* at 197. It appears that this extension of the *Santa Fe* ruling has not been utilized in other cases.

119. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564, 568 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974); *City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972); *Anderson v. Gladden*, 293 F.2d 463, 466 (9th Cir. 1961); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004 (D. Minn. 1971).

120. For example, the Court in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), cited *Pigeon River Co. v. Cox*, 291 U.S. 138 (1924), an international treaty case, as authority for the "not lightly implied" test. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004 (D. Minn. 1971), also relied upon *Pigeon River*.

121. Compare *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959) (*Seneca I*), discussed in text accompanying notes 232-40 *infra*, with *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *infra*, and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971), discussed in text accompanying notes 195-204 *infra*. *Seneca I* afforded little protection for Indian treaty rights under the "clear showing" test, while both *Menominee* and *Leech Lake* were highly protective of treaty rights, although the logically weaker "not lightly implied" test was used.

ing of congressional intent to abrogate, but neither provides a sufficient basis for determining how strong that showing must be.<sup>122</sup>

### 3. *Abrogation Only After "Liberal Construction" of the Statute in Favor of Indian Treaty Rights*

It is familiar law that Indians are entitled to a liberal construction of treaties in their favor.<sup>123</sup> In several cases, however, the rule has been extended to require a result favorable to the Indians when a statute and a treaty are in conflict.

*Choate v. Trapp*<sup>124</sup> involved the taxability of Indian allotments. Land had been allotted to the Choctaw and Chickasaw tribes under the Curtis Act,<sup>125</sup> which provided that the allotments were to be non-taxable for a specified time. Before the time period expired, Congress passed another act<sup>126</sup> removing restrictions from the sale or encumbrance of the allotments and making those lands taxable.

The Court defined the main question to be whether the tax exemption conferred by the Curtis Act was a "gratuity" or a valuable property right for which compensation must be paid. Since there was doubt on the subject, the Court held that Congress was conclusively presumed to have intended the latter. It found this presumption to be compelled by the principle that with respect to Indian rights, "doubtful expressions" in the subsequent statute must be "resolved in favor of" the Indians.<sup>127</sup>

Thus, with *Choate*, the doctrine of liberal interpretation of Indian treaty rights made a long but logical jump: from the familiar rule that Indians are entitled to a liberal reading of *treaties* in their favor to the *Choate* position that Indians are entitled to a favorable construction of the subsequent statute in a treaty-statute conflict.

*United States v. Cutler*<sup>128</sup> involved a conflict between an Indian treaty and an international treaty. The Indian's treaty rights included the right to hunt and fish on unoccupied lands of the United States. After the tribe had exercised its rights for some 70 years, a member was prosecuted for shooting birds in violation of the Migratory Bird

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122. That courts have tended to use the two tests interchangeably is indicated by *Kimball v. Callahan*, 493 F.2d 564, 568-69 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974), where the court referred to both tests.

123. See text accompanying notes 75-89 *supra*.

124. 224 U.S. 665 (1912).

125. Act of June 28, 1898, ch. 517, 30 Stat. 495, 507.

126. Act of May 27, 1908, ch. 199, 35 Stat. 312.

127. 224 U.S. at 675-76; *accord*, *Bennett County v. United States*, 394 F.2d 8, 11-12 (8th Cir. 1968), discussed in text accompanying notes 205-13 *infra*.

128. 37 F. Supp. 724 (E.D. Idaho 1941).

Treaty Act,<sup>129</sup> the enforcing statute of a treaty between the United States and Great Britain.<sup>130</sup> Since Indian hunting and fishing rights were mentioned in neither the Migratory Bird Treaty nor the Act, congressional intent on the subject was ambiguous. In the face of ambiguity, the court resolved its doubts in favor of the Indians:

When in considering treaties with Indians and acts of Congress relating to their rights, we should not forget the well known liberal application of the principle, that grants by them should be regarded "strictissimi juris" and all uncertainties resolved in their favor.<sup>131</sup>

This rule, like the "clear showing" rule, appears to come into play only when congressional intent is ambiguous.<sup>132</sup> But unlike the "clear showing" rule—in which judicial investigation ends with the finding of ambiguity, since the court then is required to find against abrogation—a court using the "liberal construction" rule is required upon a finding of ambiguity to turn to the statute and construe it liberally in favor of the Indians.

#### 4. *Abrogation Only Upon Express Legislative Reference to Indian Treaty Rights*

Several cases, both old and new, have held or implied that Congress must make an express statement in order to abrogate Indian treaty rights. *Leavenworth, Lawrence, & Galveston Railroad Co. v. United States*<sup>133</sup> involved a statutory grant of large amounts of land to the State of Kansas for railroad purposes. The issue was whether the treaty lands of the Osage tribe were subject to the statutory grant. Although the Court indicated that its holding was based partially on the fact that the grant was for railroad purposes, it held that the treaty lands were not included within the grant because there was no express language by Congress:

Such grants could not be otherwise construed; for Congress cannot be supposed to have thereby intended to include lands previously

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129. 16 U.S.C. §§ 703 *et seq.*, as amended (1970).

130. Convention with Great Britain, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628.

131. 37 F. Supp. at 725.

132. Each authority using this rule construed the statute only after concluding that congressional intent was ambiguous. See text accompanying notes 127, 131 *supra*. Thus the "liberal construction" doctrine appears to reverse normal procedure and look to the legislative intent first and to the statute second. A more logical process would have the court first liberally construe the statute in favor of the Indians to determine if it actually conflicted with the treaty; if conflict resulted the court could turn to an examination of congressional intent and require a "clear showing." This approach is consistent with the normal practice in statutory interpretation, which looks to legislative history only if the statute is ambiguous. See, e.g., *United States v. Oregon*, 366 U.S. 643, 648 (1961); *Louisville & N.R.R. v. United States*, 282 U.S. 740, 757-58 (1931); *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929).

133. 92 U.S. 733 (1876).

appropriated to another purpose, unless there be an express declaration to that effect. . . . As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.<sup>134</sup>

In *Frost v. Wenie*,<sup>135</sup> a homestead entry was made upon Osage trust land. Although the Homestead Act in question<sup>136</sup> was broad enough on its face to include trust land,<sup>137</sup> it did not specifically refer to that land. The Court held that the trust land was not subject to homestead in the absence of an express statement in the subsequent statute. It quoted with approval language from a decision by the Secretary of Interior on the same point:

"Especially do I think this view is warranted in the absence of any express words of repeal; for, had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, I feel certain it would have expressed that intention in plain words and not left it to implication."<sup>138</sup>

A requirement of express statutory abrogation is strongly suggested by a highly significant line of recent Supreme Court cases on questions of jurisdiction in "Indian country."<sup>139</sup> These cases are closely analogous to treaty abrogation cases, for one of the major attributes of Indian trust land is that the tribe has sovereignty over it.<sup>140</sup> In *Williams v. Lee*,<sup>141</sup> the Court noted that, in the first instance, tribes have criminal jurisdiction over Indians on the reservation.<sup>142</sup> It added: "Significantly, when Congress has wished the States to exercise this power, it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."<sup>143</sup>

Two other recent cases have discussed whether particular areas are "Indian country" for the purposes of federal jurisdiction. In *Sey-*

134. *Id.* at 741-42.

135. 157 U.S. 46 (1895).

136. Act of Dec. 15, 1880, ch. 1, 21 Stat. 311.

137. The Court noted that the words of the Act "are broad enough, if literally interpreted, to embrace *all*" of the Osage trust land. 157 U.S. at 58 (emphasis in original).

138. *Id.* at 60, quoting 6 L.D. [*sic*] [I.D.] 540.

139. The geographic area over which federal Indian jurisdiction extends is termed "Indian country," 18 U.S.C. § 1151 (1970), and includes "all land within the limits of any Indian reservation." *Id.* The cases discussed here involve areas which were allegedly removed from reservations and, arguably, were no longer "Indian country" for jurisdictional purposes.

140. See notes 13 & 16 *supra*, and accompanying text.

141. 358 U.S. 217 (1959).

142. *Id.* at 220.

143. *Id.* at 221 (emphasis added). In a footnote to the *Williams* opinion, the Court listed several instances in which jurisdiction has been expressly granted to states. *Id.* n.6; accord, *Kennerly v. District Court*, 400 U.S. 423, 427 (1971).

*mour v. Superintendent*,<sup>144</sup> the Court noted that the controlling legislation did not contain "any language . . . expressly vacating" the land in question,<sup>145</sup> although the Court did examine subsequent congressional treatment of the land. The leading case of *Mattz v. Arnett*<sup>146</sup> involved a claim of termination of reservation status, which if upheld would have meant the loss of many of the special rights accruing from the trust relationship. In this context, the Court specifically stated the need for an explicit statement by Congress:

[C]lear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an attempt to terminate the reservation. . . . A congressional determination to terminate must be *expressed on the face of the Act* or be clear from the surrounding circumstances and legislative history.<sup>147</sup>

Several other opinions during the last 20 years have indicated that express congressional action is necessary to abrogate Indian treaty rights.<sup>148</sup>

The only recent Supreme Court case even arguably inconsistent with this trend is *FPC v. Tuscarora Indian Nation*.<sup>149</sup> Rejecting a requirement of an express statutory statement, the majority in *Tuscarora* squarely held that the lands at issue were "not subject to any treaty."<sup>150</sup>

144. 368 U.S. 351 (1962).

145. *Id.* at 355.

146. 412 U.S. 481 (1973).

147. *Id.* at 504-05 (emphasis added). In the latest case on this issue, the Court found a strong showing that Congress had intended an abrogation: "[I]n this case, 'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *DeCoteau v. District County Court*, 43 U.S.L.W. 4321, 4327 (March 3, 1975). The Court emphasized that *DeCoteau*, unlike *Mattz*, did not involve "a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented." *Id.* at 4328. The Court then specifically noted that it was "not departing from, but following and reaffirming, the guiding principles of *Mattz and Seymour*." *Id.*

148. See *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), discussed in text accompanying notes 205-17 *infra* ("We find it difficult to believe that Congress, without explicit statement, would . . . [destroy] property rights conferred by treaty . . ."); *Bennett County v. United States*, 394 F.2d 8, 12 (8th Cir. 1968), discussed in text accompanying notes 205-13 *infra*; *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 196 (D.S.D.), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958) (the *Standing Rock Sioux* case), discussed in text accompanying notes 216, 221-30 *infra*. See also *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974). Perhaps the boldest statement of the doctrine is in *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971), discussed in text accompanying notes 195-204 *infra*, in which the court observed that "[i]f it was the intention of Congress to disestablish the Leech Lake Reservation, the Congress knew how to say so in clear language."

149. 362 U.S. 99 (1960) (6-3 decision).

150. *Id.* at 123.

Accordingly, the Court did not discuss the test applicable to treaty abrogations.<sup>151</sup> Justice Black, dissenting with Chief Justice Warren and Justice Douglas in *Tuscarora*, included a comprehensive discussion on the issue of congressional takings of Indian treaty land.<sup>152</sup> He argued for the utmost clarity in dealings between the federal government and its Indian wards:

Congress has been consistent in generally exercising this power to take Indian lands only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian land.<sup>152</sup>

Since *Tuscarora* rejected the claim that the lands involved were treaty lands, it is a fact that no Supreme Court case during the last half century has permitted the abrogation of Indian treaty rights without an express statement in a subsequent statute. Thus there is a growing judicial tendency to require clarity and specificity in legislative abrogations.

The force of these considerations is best evidenced by *United States v. White*,<sup>154</sup> a late 1974 case in which the Eighth Circuit squarely held that express legislative action was required to abrogate Indian treaty rights. *White* involved a criminal prosecution for a violation of 16 U.S.C. § 668(a), prohibiting the taking of eagles. The defendant, a member of the Red Lake Band of Chippewa Indians, claimed that his right to take eagles on the reservation was protected by treaty. The court concluded that "it was incumbent upon Congress to expressly abrogate or modify the spirit" of the treaty relationship and that Congress had not done so.<sup>155</sup> *White* represents the first comprehensive judicial analysis of the applicability of the rule of express legislative action to Indian treaty rights.<sup>156</sup>

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151. A similar, older case is *Henkel v. United States*, 237 U.S. 43 (1915), where the Court dealt with land held pursuant to statute, not treaty, and did not apply any of the tests discussed in this section.

152. It is important to note that the majority did not reach the question of congressional abrogation of Indian treaties. See text accompanying notes 149-50 *supra*. Thus Justices Black, Warren, and Douglas were dissenting on an issue which they believed the Court should have reached but which it did not.

153. *Id.* at 131 (dissenting opinion).

154. 508 F.2d 453 (8th Cir. 1974) (2-1 decision).

155. *Id.* at 457-58.

156. After noting that treaty rights can be abrogated by Congress, *id.* at 456, the court focused on the method of abrogation. Relying primarily on *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *infra*, *United States v. Payne*, 264 U.S. 446 (1924), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *United States v. Cutler*, 37 F. Supp. 724 (E.D. Idaho 1941), discussed in text accompanying notes 128-30 *supra*, the court concluded that abrogation of Indian treaties is controlled by the rule of express legislative action. 508 F.2d at 457-58. Judge Lay dissented, arguing that "[i]t has long been the rule that a subsequent incon-

## 5. Miscellaneous Tests

Courts have occasionally indicated that treaty rights can be extinguished only with consent of the tribe.<sup>157</sup> For example, the Eighth Circuit in *First National Bank v. United States*<sup>158</sup> stated:

This [Indian] right of possession and occupancy has been universally recognized in this country as sacred and as something which could not be taken away from the Indians without their consent, and then only upon such considerations as might be agreed upon.<sup>159</sup>

*Minnesota v. Hitchcock*,<sup>160</sup> decided in 1902, also referred to a consent requirement, and Justice Black, dissenting in *FPC v. Tuscarora Indian Nation*, reiterated that consent may be a prerequisite to abrogation.<sup>161</sup>

The present status of this test is in doubt. Arguably, a requirement of tribal consent is inconsistent with the holding in *Lone Wolf v. Hitchcock*<sup>162</sup> that Congress has the unilateral power to abrogate Indian treaties. In addition, a Supreme Court majority has not made use of the principle since *Minnesota v. Hitchcock*.<sup>163</sup> Furthermore, courts have implied that tribal consent is really a requirement Congress has imposed upon its own dealings rather than a requisite to a court's finding of abrogation.<sup>164</sup>

Other standards have been advanced in the cases. It has been stated that general congressional acts do not serve to abrogate Indian treaty rights.<sup>165</sup> In addition, there has been a strong reluctance to con-

sistent law which cannot be reconciled with a prior treaty is deemed to abrogate the treaty to the extent of the inconsistency *without specific words of abrogation*." *Id.* at 459 (authorities omitted; emphasis in original).

157. A federal statute affords protection to tribes organized under the Indian Reorganization Act by providing that constitutions adopted by such tribes "shall vest" in those tribes the power "to prevent the sale, disposition, lease, or encumbrance of tribal land, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476 (1970). Tribal rights under this section are not entirely clear because only one inconclusive case has been litigated. In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court took the view that the language of the section "would be effective only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands." *Id.* at 107 (dictum).

158. 59 F.2d 367 (8th Cir. 1932).

159. *Id.* at 368.

160. 185 U.S. 373 (1902).

161. See text accompanying notes 152-53 *supra*.

162. 187 U.S. 553 (1903).

163. 185 U.S. 373 (1902).

164. See *Bennett County v. United States*, 394 F.2d 8, 12 (8th Cir. 1968), discussed in text accompanying notes 205-13 *infra*; cf. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 131-32 (1960) (Black, J., dissenting).

165. *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 742 (1876); *McCandless v. United States*, 25 F.2d 71 (3d Cir. 1928); *Lewellyn v. Colonial Trust Co.*, 17 F.2d 36, 37-38 (3d Cir. 1927). But see *FPC v. Tuscarora Indian Nation*, 362 U.S.



strue statutes in a manner which would permit takings of Indian lands without compensation.<sup>166</sup> Both points may be well taken, but their importance should not be overstated. It is true that some general acts are construed not to apply to Indians. In the treaty abrogation situation, however, this boils down to a question of congressional intent. Acts may be "general" in the sense that they do not refer to Indians specifically, but may nevertheless apply to large geographic areas which include Indian lands.<sup>167</sup> The question remains whether Congress was aware that Indian treaty rights were involved and intended they be abrogated.

One court has attempted to discern a "legislative pattern" of dealing with particular Indian treaty rights and has then sought to determine whether the pattern was consistent with traditional methods of abrogation.<sup>168</sup> Although this test has superficial appeal, the enormity of the task of finding such a pattern—after all, Congress deals with more than 400 Indian tribes—is likely to make the "legislative pattern" test nothing more than makeweight.<sup>169</sup>

Another treaty abrogation doctrine (applied by the Second Circuit) is that Congress can "impliedly delegate" to an administrative

99 (1960), where the Court, although not dealing with trust land, stated that "[t]he intent to exclude [Indians from general legislation] must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter." *Id.* at 116-17, quoting from *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418, 420 (1934).

The government's reliance on a general statute was also a crucial factor in the district court's finding of no abrogation in *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 198 (D.S.D.), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958) (the *Standing Rock Sioux* case), discussed in text accompanying notes 234, 239-48 *infra*.

166. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941); *United States v. Creek Nation*, 295 U.S. 103, 109-11 (1935); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Choate v. Trapp*, 224 U.S. 665 (1912); *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 742-44 (1876).

167. Such was the situation in *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959) (*Seneca I*), discussed in text accompanying notes 249-57 *infra*, and also in *United States v. 687.30 Acres of Land*, 319 F. Supp. 128 (D. Neb. 1970), *appeals dismissed*; 451 F.2d 667 (8th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972) (the *Winnebago* case), discussed in text accompanying notes 214, 217-20 *infra*. But see *United States v. 2005.32 Acres of Land*, 160 F. Supp. 193, 198 (D.S.D.), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1955) (the *Standing Rock Sioux* case), discussed in text accompanying notes 215, 221-30 *infra*.

168. See *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 199 (D.S.D.), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958) (the *Standing Rock Sioux* case), discussed in text accompanying notes 215, 221-30 *infra*.

169. *Standing Rock Sioux*, *id.* at 200, notwithstanding, enactment of seven statutes is probably not conclusive. Nor would enactment of 70 statutes necessarily be sufficient.

agency its power to abrogate treaties.<sup>170</sup> Only in one case<sup>171</sup> has another court used this test, which would so profoundly expand the scope and frequency of treaty abrogations.

A presumption *against* the preservation of Indian treaty rights was found in *Ward v. Race Horse*,<sup>172</sup> decided in 1896, but the case has been almost entirely emasculated by later decisions. *Ward* and the cases following it ignore the firm rules of liberal treaty construction in favor of the Indians which were suggested as early as 1832 in *Worcester v. Georgia*,<sup>173</sup> and are black letter law today.<sup>174</sup> Furthermore, *Ward* was premised on the "equal footing doctrine" which has since been rejected by the Supreme Court.<sup>175</sup> On the question of implied abrogation, *Ward* can be accorded no further validity in light of *Menominee Tribe v. United States*.<sup>176</sup> *Ward* and the cases following it are discussed here

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170. *Seneca Nation of Indians v. Brucker*, 338 F.2d 55 (2d Cir. 1964), *cert. denied*, 380 U.S. 952 (1965) (*Seneca II*), discussed in text accompanying notes 241-48 *infra*.

171. *United States v. 687.30 Acres of Land*, 319 F. Supp. 128 (D. Neb. 1970), *appeals dismissed*, 451 F.2d 667 (8th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972) (the *Winnebago* case), discussed in text accompanying notes 214, 217-20 *infra*.

172. 163 U.S. 504 (1896). In *Ward*, the Court dealt with purportedly permanent hunting rights reserved, in lands that became a part of the State of Wyoming, by the Bannock Tribe in an 1868 treaty. Treaty with the Shoshones and Bannacks [sic], 15 Stat. 673 (1868). The Court held that the treaty language "clearly contemplated the disappearance of the conditions therein specified" when Wyoming became a state. 163 U.S. at 509. Any other holding, the Court reasoned, would require "the assumption that Congress, whilst preparing the way, by the treaty, for new settlements and new States, yet created a provision not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the States already existing." *Id.* Thus, the Court implied that treaties should be interpreted in a manner which would not restrict new white settlement on land subject to Indian treaty rights. *Ward* has been followed in two federal cases, *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1915), and *United States ex rel. Marks v. Brooks*, 32 F. Supp. 422 (N.D. Ind. 1940).

173. 31 U.S. (6 Pet.) 515, 582 (1832).

174. These rules are set out in the text accompanying notes 76-78 *supra*. Perhaps the rule most dramatically ignored was the principle that Indian treaties must be interpreted as the Indians themselves would have understood them. *See* cases cited at note 77 *supra*. Rather, the sole inquiry in *Ward* was what the United States intended in the treaty. *See* note 172 *supra*.

175. Any doubts about the validity of the "equal footing doctrine" were laid to rest in *United States v. Winans*, 198 U.S. 371, 382-84 (1905). The *Ward* opinion "proved so outrageous to Congress that it appropriated funds to compensate the tribe for its alleged loss." Deloria, *Indian Treaties A Hundred Years Later*, 5 RACE REL. REP., March 1974 at 29, 31. *See also* S. REP. No. 60, 56th Cong., 1st Sess. (1900) (appropriation of \$75,000 to compensate Indians for loss). Thus the "strict holding of *Ward* has been modified by implication in subsequent decisions." *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967). *See also* *Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974).

176. 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *infra*. *Ward* is cited in *Menominee Tribe*, but only for the point that states may not regulate treaty rights on reservations in the absence of a cession by Congress. *Id.* at 411 n.12.

only because, although it seems inevitable, they have not yet been expressly overruled.

For the indicated reasons, the miscellaneous tests discussed in this part either have been used infrequently, or are not dispositive without further analysis.

### *B. Recent Applications*

As the foregoing discussion has shown, the present state of the law is confused and could be expected to produce inconsistent results. There are several tests, with major practical distinctions among them. Moreover, the commonly used tests are sufficiently vague that courts have broad leeway in applying them. In this part, these problems will be further explored in an analysis of seven important cases decided during the last 20 years. As will be seen, the fears of inconsistent adjudication have been realized.

A surprising revelation of these cases is that courts analyzing treaty abrogation claims have wholly failed to utilize the well-developed law surrounding the judicial analysis of congressional intent. Since congressional intent is usually the crucial object of contention in treaty abrogation cases, this failure may further account for the present confusion in this body of law.

The many authorities on the analysis of legislative intent indicate a hierarchy of reliability, with the basic components of legislative history arrayed in five basic categories:

1. *Indicators which should usually be rejected:* Testimony and evidence offered by non-legislators at committee and subcommittee hearings.<sup>177</sup>

2. *Generally unreliable indicators:* Statements made in de-

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177. Testimony by witnesses at hearings has been consistently found to be of doubtful value. See, e.g., *Railroad Retirement Bd. v. Duquesne Warehouse Co.*, 149 F.2d 507, 510 (D.C. Cir. 1945), *aff'd*, 326 U.S. 446 (1946); *Schwegemann Bros. v. Calvert Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), see also Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537-38 (1948). There are a few cases in which such testimony was used to determine legislative intent. *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278-79 (1929); *O'Hara v. Luckeubach S.S. Co.*, 269 U.S. 364 (1926); *Stafford v. Wallace*, 258 U.S. 495 (1922). Criticism of this kind of evidence centers on the fact that the entire Congress should not be taken to have knowledge of the testimony taken at each committee hearing. Furthermore, this evidence of legislative intent is by definition evidence of the intent of non-legislators. Comment, *Legislative Materials to Aid Statutory Interpretation*, 50 HARV. L. REV. 822, 825 (1937).

bate by Congressmen; statements made by legislators in committee or subcommittee hearings.<sup>178</sup>

3. *Indicators which can be persuasive on some occasions:* Statements during debate by sponsors, floor managers, and committee members in charge of the legislation.<sup>179</sup>

4. *Generally reliable indicators:* Conference committee reports, committee reports, and subcommittee reports.<sup>180</sup>

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178. The Supreme Court has consistently held that debates are unreliable indicators of legislative intent. *See, e.g.,* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921). *See also* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639-40 (1967); NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 316-17 (1897); Aldridge v. Williams, 44 U.S. (3 How.) 9, 23 (1845). Especially important is the lengthy analysis by Justice Story, while he was a circuit court judge, in Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (No. 9,662) (C.C. Me. 1843). The rule is relaxed when the statements are made by a sponsor, a floor manager, or a senior committee member. *See* cases cited at note 179 *infra*.

179. *See generally* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 n.22 (1956); Schwegemann Bros. v. Calvert Corp., 341 U.S. 384, 394-95 (1951) (all involving sponsors); Portland Cement Co. v. Ruckelshaus, 486 F.2d 375, 381-82 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Pan Am. World Airways v. CAB, 350 F.2d 770, 781-82 (2d Cir. 1967) (both involving floor managers); Chicago, M., St. P. & Pac. R.R. v. Acme Fast Freight, 366 U.S. 465, 474-76 (1949); United States v. St. Paul, M. & M. R.R., 247 U.S. 310, 318 (1918) (both involving committee members in charge of the legislation). It is well settled that committee reports are entitled to greater dignity than these statements during debate. *See, e.g.,* United States v. International Union, 352 U.S. 567, 585-86 (1957); Brennan v. Corning Glass Works, 480 F.2d 1254, 1260 (3rd Cir. 1973); Hodgson v. Corning Glass Works, 474 F.2d 226, 232 (2nd Cir. 1973). Statements by these ranking legislators have flatly been rejected when they contradict committee reports. *See, e.g.,* United States v. International Union, 352 U.S. 567, 585-86 (1957). (Senator Taft's statements on the floor were "not entitled to the same weight" as committee reports in interpreting the Taft-Hartley Act); Banco Nacional de Cuba v. Farr, 383 F.2d 155, 175 (2nd Cir. 1966) (statements by Senator Hickenlooper were of "some significance" in interpreting the Hickenlooper Amendment, but were of a lesser dignity than the committee report). *But see* Chicago, M. St. P. & Pac. R.R. v. Acme Fast Freight, 366 U.S. 465, 474-76 (1949). (Uncontradicted statement on floor by ranking committee member, later relied upon by administrative agency in question, held to take precedence over conflicting committee report when statements on floor were "only extended discussion" of point at issue).

180. The principal source of knowledge of a particular statute, when the language is ambiguous, is the committee report. Chamberlain, *The Court and Committee Reports*, 1 U. CHI. L. REV. 81 (1933). It is probably accurate to consider the bulk of congressional committee reports as "carefully considered." United States v. International Union, 352 U.S. 567, 585-86 (1957). Moreover, "[i]t would take extensive and thoughtful debate to detract from the plain thrust of a committee report . . . ." Zuber v. Allan, 396 U.S. 168, 186 (1969). Judge Learned Hand concluded that this heavy reliance on committee reports results from a realistic appraisal of the legislative process. SEC v. Collier, 76 F.2d 939, 941 (2nd Cir. 1935). Woodrow Wilson capsulized the function of congressional committees when he termed them "little legislatures" in a national legislature which is "conglomerate, not homogeneous." W. WILSON, CONGRESSIONAL GOVERNMENT 113 (1913). The high station given to committee reports extends, of course, to reports of joint and conference committees. United States v. Pfitsch, 256

5. *The most reliable indicator of legislative intent:* Specific reference in the enactment itself.<sup>181</sup>

Reference to this hierarchy will, in several instances during the following discussion, serve to show that some courts have based treaty abrogations on relatively unreliable indicia of legislative intent.

### 1. *The Menominee Tribe Case*

The leading case, *Menominee Tribe v. United States*,<sup>182</sup> involved a treaty<sup>183</sup> ceding land to the Menominee Tribe "as Indian lands are held."<sup>184</sup> The State of Wisconsin argued that the Menominee Termination Act of 1954,<sup>185</sup> enacted "to provide for orderly termination of Federal supervision over the property and members of the Menominee Tribe,"<sup>186</sup> made all state statutes, including hunting and fishing regulations, applicable on the former reservation.<sup>187</sup>

The Act made no specific reference to Indian hunting and fishing rights, and the Court was therefore compelled to examine legislative history to determine its meaning. Finding the legislative history on the

U.S. 547, 551 (1921); *Gemsco v. Walling*, 324 U.S. 244, 264-65 (1945). See also Note, *Conference Committee Material in Interpreting Statutes*, 4 STAN. L. REV. 257 (1952).

181. Plainly, the most reliable indicator of legislative intent is the statute itself. See, e.g., *Department & Speciality Store Empl. Union v. Brown*, 284 F.2d 619, 627 (9th Cir. 1960) ("language of the statute is the best and most reliable index of its meaning"). It is perhaps true, however, that only rarely is a statute completely unambiguous. Cf. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 TEX. L. REV. 63, 75 (1956). Nevertheless, the statute is a single document and, if intent is clearly stated there, the task is inevitably far easier than if a court must turn to the words of 535 legislators, several executive agencies, committee and subcommittee reports, and other witnesses who may participate in the legislative process.

182. 391 U.S. 404 (1968). For a description of the case's background, see Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1261-64 (1969).

183. Treaty with the Menominee Indians, May 12, 1854, 10 Stat. 1064.

184. *Id.* at 1065. Within reservation boundaries, hunting and fishing rights are tribal property, *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925), and subject to "exclusive" tribal control. *United States v. Winans*, 198 U.S. 371 (1905). See also COHEN, *FEDERAL INDIAN LAW*, *supra* note 8, at 285-86. Some off-reservation fishing rights, which were not involved in *Menominee Tribe*, are subject to very limited regulation by the states. See *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

185. 25 U.S.C. §§ 891-902 (1970). The Menominee Termination Act of 1954 has now been repealed and the Tribe and its members have been restored to full federal treaty status. *Menominee Restoration Act* 25 U.S.C. § 903 (Supp. 1975). For a detailed study on the Menominee termination, see Orfield, *A Study of the Termination Policy*, in SUBCOMM. ON INDIAN EDUCATION, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG., 1ST. SESS., *THE EDUCATION OF AMERICAN INDIANS*, 673-816 (Comm. Print 1969).

186. See 25 U.S.C. § 891 (1970).

187. The Act provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U.S.C. § 899 (1970).

Act ambiguous,<sup>188</sup> the Court looked to congressional enactments occurring after the Termination Act. The Court noted that Congress passed Public Law 280,<sup>189</sup> which expressly exempted Indian hunting and fishing rights from the jurisdiction of the states, only two months after the passage of the Termination Act. In light of this, the Court found that Congress did not intend to extinguish the hunting and fishing rights of the Menominee Tribe. Applying the "not lightly implied"<sup>190</sup> test, it found that the rights were not abrogated. The Court probably best articulated its holding, however, by stating its disbelief that the Termination Act was intended to abrogate treaty rights in "a backhanded way."<sup>191</sup>

The *Menominee Tribe* case is a particularly strong statement in support of Indian treaty rights. Certainly there were persuasive arguments for finding that the Tribe had lost its hunting and fishing rights: The Tribe's counsel had taken that position in opposing the Termination Act during congressional hearings,<sup>192</sup> and the Act itself provided that state law was to govern the Tribe and its members.<sup>193</sup> The Act provided no explicit protection for hunting or fishing rights, as did the companion legislation, the Klamath Termination Act, which expressly protected treaty fishing rights.<sup>194</sup> Thus, at the very least, the case should serve as notice that an extremely strong showing of legislative intent may be required by the Supreme Court to support an abrogation. Unfortunately, however, the Court offered little analysis of the controlling legal test; it is perhaps too vague a standard to suggest that treaty rights can only be abrogated in a "forehanded" manner.

## 2. *The Leech Lake Case*

*Leech Lake Band of Chippewa Indians v. Herbst*,<sup>195</sup> a declaratory relief action in which the Tribe sought to establish its right to hunt and fish on its reservation lands, also afforded vigorous protection for Indian treaty rights. The district court found that the 1855 treaty establishing the reservation had reserved hunting and fishing rights to the

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188. Senator Watkins, the author of the bill, stated that the bill "in no way violates any treaty obligation with this tribe." 391 U.S. at 413. On the other hand, counsel for the Menominee, speaking against the bill, had argued that the bill would by implication abolish those hunting and fishing rights. *Id.* at 408.

189. 18 U.S.C. § 1162 (1970), discussed at note 16 *supra*.

190. 391 U.S. at 413.

191. *Id.* at 412. For the pertinent language, see note 148 *supra*.

192. See note 188 *supra*.

193. See note 187 *supra*.

194. 25 U.S.C. § 564m(b) (1970) (the Act shall not "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty").

195. 334 F. Supp. 1001 (D. Minn. 1971).

Tribe. In 1889, however, Congress passed the Nelson Act,<sup>196</sup> which provided for "a complete extinguishment of the Indian title" in the area in question.<sup>197</sup> A contemporaneous agreement between the Tribe and the United States provided that the Tribe relinquish "'all our right, title and interest'" in the subject land.<sup>198</sup> Despite the explicit language of the Nelson Act and agreement, the court held that they did not effect a termination of the reservation or loss of the tribal hunting and fishing rights. Accordingly, state hunting and fishing laws did not apply to tribal members on the reservation. The court reasoned that "[i]f it was the intention of Congress to disestablish the Leech Lake Reservation, the Congress knew how to say so in clear language."<sup>199</sup> The court rejected the Tribe's position that its treaty rights were exclusive, however, ruling that the state had the power to regulate hunting and fishing by non-Indians on the reservation.<sup>200</sup>

The *Leech Lake* case therefore stands with *Menominee Tribe*<sup>201</sup> as an example of judicial protection of cherished Indian treaty rights.<sup>202</sup> As the *Leech Lake* opinion implies,<sup>203</sup> a court which finds that hunting and fishing rights (plainly a property "right" or "interest"<sup>204</sup>) are not extinguished by a grant of "all our right, title and interest" would almost certainly permit such important rights to be extinguished only by the most explicit statement in the abrogating statute.

### 3. *The Bennett County Case*

*Bennett County v. United States*<sup>205</sup> concerned a dispute over the use of Indian land for highway purposes. Bennett County argued that

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196. Act of Jan. 14, 1889, ch. 24, 25 Stat. 642.

197. 345 F. Supp. at 1003.

198. *Id.* (emphasis added by the court).

199. *Id.* at 1005. The court noted that this holding was fortified by subsequent legislation. *Id.* at 1005-06.

200. *Id.* at 1005-06.

201. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *supra*.

202. For cases at the opposite end of the spectrum, see text accompanying notes 214, 217-20, 232-43 *infra*.

203. See 334 F. Supp. at 1004-06.

204. *United States v. Winans*, 198 U.S. 371, 381 (1905), described off-reservation fishing rights as creating a "right in the [non-tribal] land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned." The Court also described the reserved rights as imposing "a servitude upon every piece of land." *Id.* The right to take game or fish from specified land, as opposed to the right to cross land to reach the hunting or fishing ground, is indistinguishable from a profit, which is a property interest. See, e.g., *Minnesota Valley Gun Club v. Northline Corp.*, 207 Minn. 126, 128-29, 290 N.W. 222, 224 (1940) (hunting rights); *St. Helen Shooting Club v. Mogle*, 234 Mich. 60, 65, 207 N.W. 915, 917 (1926) (hunting rights); *State v. Mallory*, 73 Ark. 236, 246-48, 83 S.W. 955, 958-59 (1904) (profit includes the right to take game or fish).

205. 394 F.2d 8 (8th Cir. 1968).

it was granted authority to use the land for such purposes by two specific acts of Congress.<sup>206</sup> The United States, on behalf of the Oglala Sioux and in its own right, brought an action to restrain such use pending compliance with two other federal statutes.<sup>207</sup>

The County's main argument was based on a congressional act of 1889, which restored part of the reservation to the public domain and provided "that there shall be reserved public highways four rods wide around every section of land allotted, or opened to settlement by this act . . . ."<sup>208</sup> It argued that the expression "land allotted" applied not only to the lands reinstated to the public domain but also to lands allotted on the reservation to Indians.<sup>209</sup>

The Eighth Circuit held that the Indian land could not be taken without a clear and unequivocal statement by Congress.<sup>210</sup> It found that the legislative history and context of the proviso relied on by the county could not sustain such a burden:

Without a more clearly expressed provision, we cannot believe that Congress intended to impose a servitude upon land within the reservations without requiring the consent of the tribe or Secretary, and without payment of compensation for the taking.<sup>211</sup>

Thus, like the later *Menominee Tribe* case,<sup>212</sup> *Bennett County* required a strong showing of legislative intent. "Allotted land" had been specifically mentioned in the statute and the phrase has specific meaning in regard to Indian lands.<sup>213</sup> Thus the statute could easily have been found applicable to the Indians' property. The court, however, applied an elevated standard of construction and refused to extinguish Indian rights.

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206. Public Highway Act of 1866, ch. 262, § 8, 14 Stat. 251, 253; Act of March 2, 1889, ch. 405, § 21, 25 Stat. 888.

207. 25 U.S.C. § 311 (1970) (requiring permission from the Secretary of the Interior); 25 U.S.C. § 357 (1970) (securing the land by condemnation).

208. Act of March 2, 1889, ch. 405, § 21, 25 Stat. 888.

209. The General Allotment Act of 1887, or Dawes Act, generally provided for the allotment of tribal treaty land to individual tribal members. 25 U.S.C. §§ 331-58 (1970). All allotted land remained in trust for at least 25 years, and the period was subject to further extensions. *Id.* § 348. In 1934, Congress extended the period of trust for all allotted lands, *id.* § 462, and terminated all further allotments. *Id.* § 461. The allotment system was discarded because it was "stripping" Indians "of their property" and leading to "ruin for the Indians." HEARINGS ON H.R. 7902 BEFORE THE COMM. ON INDIAN AFFAIRS, 73d Cong., 2d Sess. 15-18 (1934). The allotted land in *Bennett County* was trust land because the period of trust had been extended pursuant to the above provisions. 394 F.2d 8, 9 n.1 (8th Cir. 1968).

210. 394 F.2d at 11-12.

211. *Id.* at 15.

212. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *supra*.

213. See note 209 *supra*.



#### 4. *The Winnebago and Standing Rock Sioux Cases*

Two district court decisions, *United States v. 687.30 Acres of Land*<sup>214</sup> (the *Winnebago* case) and *United States v. 2,005.32 Acres of Land*<sup>215</sup> (the *Standing Rock Sioux* case) exemplify the judicial confusion in this area. The subject of both cases was the attempted condemnation of Indian land by the Secretary of the Army for dam and reservoir projects. The Indian tribes objected to the condemnations, arguing that their title to the land was guaranteed in perpetuity by treaty and that Congress had not given a clear indication of its intent to breach those treaties. In both cases the courts dealt with similar sources of congressional intent; indeed, although more than 10 years separated the cases, several of the same statutes were involved. Both courts applied the "clear showing of congressional intent" standard.<sup>216</sup> Nevertheless, the courts reached contrary results.

In *Winnebago*, decided in 1970, the Nebraska federal district court's analysis was brief. The court first emphasized that eminent domain power is an inherent aspect of the sovereignty of the United States and, as such, is limited only by the just compensation clause of the fifth amendment.<sup>217</sup> It then found that Congress, rather than expressly authorizing by special enactment every taking of Indian land, could delegate some of its authority to administrative agencies.<sup>218</sup> The court asserted that Congress "unquestionably" intended to include this Indian land in the project, thus necessitating the condemnation,<sup>219</sup> citing five acts of Congress it termed a "comprehensive plan" of which the project was a part.<sup>220</sup> The court, however, did not analyze the legislative history of these five acts.

The *Standing Rock Sioux*<sup>221</sup> factual situation was similar to the *Winnebago* case, but the South Dakota federal district court upheld the treaty right. Initially, the court acknowledged congressional authority to condemn the land, even though condemnation would be an abrogation of treaty provisions:

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214. 319 F. Supp. 128 (D. Neb. 1970), appeals dismissed, 451 F.2d 667 (8th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972).

215. 160 F. Supp. 193 (D.S.D.), *vacated as moot mem. sub nom.* *United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958).

216. See text accompanying notes 108-11 *supra*.

217. 319 F. Supp. at 132.

218. *Id.* at 133.

219. *Id.*

220. Act of June 28, 1938, ch. 795, 52 Stat. 1215; Flood Control Act of 1944, ch. 665, 58 Stat. 887; Act of March 2, 1945, ch. 19, 59 Stat. 10; Act of Oct. 23, 1962; Pub. L. No. 87-874, 76 Stat. 1173; Act of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 323.

221. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D.), *vacated as moot mem. sub nom.* *United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958).

But this is not to say that the treaty provisions are to be ignored, but instead it is to require that there be clear Congressional action which indicates an intention to abrogate the terms of the treaty. Manifestly, this must be so if the treaty is to have any meaning at all. . . . The minimum meaning of these treaty provisions . . . is that they stand as the highest expressions of the law regarding Indian land until Congress states to the contrary. The Indians are entitled to depend on the fulfillment of the terms of the treaty until the Congress clearly indicates otherwise by legislation.<sup>222</sup>

Thus, although the court recognized the power of Congress to condemn Indian land and to extinguish Indian treaty rights, it focused upon the *method* by which such rights are to be abrogated.

The Corps based its authority on an act of Congress giving general approval to plans for the development of the Missouri River Basin Project,<sup>223</sup> the same legislation relied upon by the government in *Winnnebago*.<sup>224</sup> Although the Act did not mention Indian lands, a Senate document containing the authorized plans stated that Indian lands would necessarily be inundated.<sup>225</sup> The court reasoned that this showed congressional *awareness* of the need to acquire Indian lands, but that it did not *authorize* the acquisition of such lands by condemnation. Rather, the court read the report as contemplating acquisition of the lands by voluntary negotiations.<sup>226</sup>

It found several other factors indicating that the requisite authority did not exist. Perhaps most important was the government's reliance on a general statute. The court found untenable the proposition "that a general law approving a series of particular projects can be applied to specific Indian lands which are bound by treaty."<sup>227</sup> This was a strong indication that the Corps could not meet the substantial burden of proving its authority to exercise eminent domain. In addition, the court cited the principle that any statute allegedly authorizing eminent domain is to be strictly construed against the party asserting it,<sup>228</sup> especially "where the taking party is the guardian and the party subject to the power of eminent domain is the ward."<sup>229</sup> Thus it concluded that a reference to Indian lands in general was not a sufficient indication

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222. *Id.* at 196-97.

223. Flood Control Act of 1944, ch. 665, 58 Stat. 887.

224. See note 220 *supra*.

225. S. Doc. No. 247, 78th Cong., 2d Sess. 4 (1946).

226. 160 F. Supp. at 197-98.

227. *Id.* at 198.

228. *Id.* at 200-01, citing *Delaware L. & W.R.R. v. Morristown*, 276 U.S. 182 (1928); *United States v. A Certain Tract of Land*, 70 F. 940 (C.C.E.D. Pa. 1894); *United States v. West Virginia Power Co.*, 33 F. Supp. 756 (S.D.W. Va. 1940).

229. 160 F. Supp. at 201.

of congressional intent to abrogate specific treaty rights of a specific tribe.<sup>230</sup>

### 5. *The Seneca Nation Cases*

Finally, the "clear showing of legislative intent" test<sup>231</sup> has been applied, with highly disturbing results, in the two *Seneca Nation* cases.<sup>232</sup> Both cases involved the Allegheny Reservoir Project which, as the District of Columbia Circuit observed in *Seneca I*, would flood a "substantial amount" of Seneca treaty land.<sup>233</sup> More precisely, the Army Corps of Engineers found it necessary to condemn slightly more than 10,000 acres of the Senecas' habitable land, leaving 2,300 acres on which they could live, and to move 134 families, more than a third of the reservation's population.<sup>234</sup> At issue in *Seneca I* was the oldest active Indian treaty with the federal government,<sup>235</sup> which assured the Senecas that the United States would protect the Tribe's perpetual right of occupancy on the reservation land and that it would "never claim the same, nor disturb the Seneca Nation."<sup>236</sup>

In *Seneca I*, the court relied upon statements made in hearings, in congressional debate, and in a Senate report<sup>237</sup> to find an abrogation. It held that Congress had expressed its intent "in a sufficiently clear and specific way" because the legislators "knew (1) that the Seneca lands would be flooded, (2) that the Seneca Nation was unwilling to relinquish any of its rights in the lands, and (3) that the lands could be taken by eminent domain."<sup>238</sup>

Despite the court's conclusions as to what "Congress knew," it is

230. *Id.* at 198.

231. See text accompanying notes 108-11 *supra*.

232. *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959) (*Seneca I*); *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964), *cert. denied*, 380 U.S. 952 (1965) (*Seneca II*).

233. 262 F.2d at 27.

234. Josephy, *Cornplanter, Can You Swim?*, 20 AM. HERITAGE 106 (1968). Josephy's article contains valuable background on the Allegheny Reservoir project. See also A. MORGAN, DAMS AND OTHER DISASTERS 310-67 (1971). Morgan, the first chairman of the TVA and an eminent flood control engineer who was intimately involved in the Allegheny Reservoir project, asserts that the engineering which went into the selection of the site for the project was incompetent. According to Morgan the Corps of Engineers was nevertheless able to gain approval for the site over another more convenient, useful, and inexpensive site which did not involve Indian lands and which was proposed both to the Corps and to Congress. He explains this as being a result of the "incredible political power" of the Corps. *Id.* at 367.

235. Treaty of Nov. 11, 1794, 7 Stat. 44.

236. 338 F.2d at 59.

237. 262 F.2d at 27-28. The court did not quote the text of any of the legislative materials.

238. *Id.* at 28.

revealing to see what Congress did *not* know. The entire text of the Senate report, as it relates to the Senecas, reads as follows:

The committee has approved the budget estimate of \$1 million to initiate construction of this project. The Corps of Engineers has indicated a willingness to accept flowage easements over land owned by the Seneca Indians, in order that the reservation may be kept intact. The committee desires that the Corps of Engineers cooperate to the maximum extent practicable with the Seneca Indians, in order to minimize the effect of the Allegheny River Reservoir on the Indian lands. It is recognized that if the Seneca Indian Nation elects to grant easements for this purpose, they will control the reservoir area within the boundaries of their reservation, and that recreational benefits will inure to the Seneca Nation as a result of the development of this project. *The committee recognizes that this procedure may not be entirely satisfactory to all the Seneca Indians, but also realizes that they have rights in the courts if they insist on determining the issues involved in the courts.*<sup>239</sup>

Thus Congress did *not* know two crucial facts. First, there is no clear indication that Congress knew treaty rights were involved. Second, and of utmost importance, Congress did not know that it had the power to make a final determination on whether such rights were to be abrogated. The Senate report states that the committee believed the Tribe still had "rights in the courts." Yet despite the very basic misconception by the Congress of its own powers and responsibilities, the court of appeals was able to conclude that there was a "sufficiently clear" showing of legislative intent to find an abrogation.<sup>240</sup>

In *Seneca II*<sup>241</sup> the Second Circuit found an abrogation under even more difficult circumstances. The Army Corps of Engineers sought to condemn treaty land to expand a two-lane road that was part of the Allegheny Reservoir Project involved in *Seneca I* to a "four-lane limited access highway."<sup>242</sup> Over a strong dissent, the majority concluded that the decision to expand the highway was an exercise of "delegated administrative discretion" from Congress to the Corps.<sup>243</sup> It cited no authority to indicate that the possibility of a four-lane highway was ever communicated to Congress.

Judge Moore's dissent in *Seneca II* is, along with the majority opinion in *Menominee Tribe*<sup>244</sup> and Justice Black's dissent in *Tuscar-*

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239. S. REP. NO. 609, 85th Cong., 1st Sess. 26 (1957) (emphasis added).

240. 262 F.2d at 27.

241. *Seneca Nation of Indians v. Brucker*, 338 F.2d 55 (2d Cir. 1964), *cert. denied*, 380 U.S. 952 (1965).

242. *Id.* at 56. Judge Moore, dissenting, noted that the highway would "divid[e] the Senecas as effectively as . . . a Chinese Wall . . ." *Id.* at 57.

243. *Id.* at 57.

244. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text accompanying notes 182-94 *supra*.

ora,<sup>245</sup> one of the classic pro-Indian discussions of treaty law. He emphasized that the issue was not whether Congress "delegated" to the Army Corps of Engineers the authority to abrogate treaties, but rather whether congressional intent to abrogate the treaty was shown in a "sufficiently clear and specific way."<sup>246</sup> There was no legislative history to support this particular taking, as the majority apparently acknowledged.<sup>247</sup> Judge Moore argued in eloquent terms that Congress alone can abrogate treaties and that the decision should be left to Congress:

Would it not be far more consistent with the Indian policy so eloquently expressed by Congress and the Supreme Court to let Congress decide whether it wishes to give to the State of New York the power to condemn Indian land for a superhighway rather than to impute to Congress an intent to vest the Secretary of the Army with such powers.

Finally, it is not amiss to note the willing cooperation of the Senecas with the wishes of the "Great Council" which has authorized the taking of their lands for flood control. They have even acquiesced gracefully in the necessitous relocation of Route 17. Their only objection is to the construction of a superhighway which will bar access from one part of their reservation to the other, will separate neighbor from neighbor and which, as they represent, "will restrict the areas where Senecas forced to relocate by the Kinzua Dam may live and will significantly disrupt intrareservation traffic". Their petition . . . to the "Great Council" (judicial) to have that other "Great Council" (legislative) determine whether this situation shall come to pass is not unreasonable.<sup>248</sup>

### C. Summary of Existing Law

If there really is a present state of the law in this field, it is set forth in *Menominee Tribe v. United States*.<sup>249</sup> If one of the courts involved in *Winnebago*, *Seneca I*, or *Seneca II* had handled the *Menominee Tribe* case, it might well have found an abrogation of the treaty right to fish. The federal government had, after all, explicitly made the Menominee subject to state law and had terminated the relationship between the United States and the Menominee Tribe, which were the two parties to the treaty. Nevertheless, the Supreme Court paraphrased the "not lightly implied" test by stating that the real meaning of the test was that Congress would not abrogate Indian treaty rights "in a backhanded way."

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245. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 124 (1960) (dissenting opinion), discussed in text accompanying notes 152 *supra* and 338 *infra*.

246. 338 F.2d at 58 (dissenting opinion).

247. *See id.* at 56.

248. *Id.* at 59 (dissenting opinion).

249. 391 U.S. 404 (1968).

The congressional intent in both *Seneca Nation* cases can fairly be characterized as resulting in "backhanded" abrogations. In *Seneca I*, Congress clearly misunderstood its own role as the final arbiter on treaty rights. In *Seneca II*, Congress did not speak at all and the court found an "implied" abrogation from a blank record. The record was similarly sparse in the *Winnebago* case, in which an intent to abrogate was also implied. In contrast, both *Bennett County* and *Standing Rock Sioux* dealt with legislative histories qualitatively and quantitatively similar to the *Seneca Nation* cases and *Winnebago*, yet both of those courts failed to find abrogations.

The present state of the law, then, is comprised of ambiguous tests that facilitate contradictory results. The recent decision in *Menominee Tribe* seems to indicate that the Supreme Court is becoming increasingly vigilant in protecting Indian treaty rights. Decisions in closely related areas are to the same effect.<sup>250</sup> Still, the only existing signposts in the treaty abrogation cases are the vague tests discussed earlier and the emphatic, but negatively phrased warning of the Court in *Menominee Tribe* that abrogations must not be "backhanded."

### III

#### A SUGGESTED LEGAL TEST TO GOVERN THE ABRIGATION OF INDIAN TREATIES

Section II has made clear the need for an objective test to define the level of congressional intent necessary to support the abrogation of Indian treaty rights. This section will propose that the courts adopt such a rule: specifically, that treaty rights of American Indians may be abrogated only by an express statement in a subsequent statute or joint resolution. The statute or joint resolution should identify the specific Indian treaty rights which are involved and state that it is the intent of Congress to abrogate such rights. It is first necessary to explore the present status of the rule of express legislative action; then it will be argued that the rule should be applied in questions involving the abrogation of Indian treaties.

##### A. *The Rule of Express Legislative Action*

There are a number of older cases, and a developing body of new law, requiring express legislative action in order for certain rights or powers to be abridged or abrogated. Courts and writers have often been ambiguous in their treatment of the rule of express legislative ac-

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250. See notes 133-50 *supra* and accompanying text.

tion vis-à-vis the doctrine of strict construction.<sup>251</sup> This breeds confusion, because the two rules of construction are fundamentally different.

Courts applying a rule of strict construction will proceed to interpret the statute, often resorting to extrinsic interpretational aids, to determine whether the legislature intended to reach the right or power. Thus a court guided by the rule of strict construction may find an *implied* legislative intent. The rule of express legislative action, on the other hand, means that a right or power cannot be abridged by implication. The subsequent statute must (1) explicitly mention the right or power and (2) expressly state that the right or power shall be abridged. Because a particular statute may contain language that will cause these distinctions to be blurred, care must be taken to differentiate between the rules. It is important to recognize that they may produce different results.

The rule of express legislative action has been applied in a wide variety of situations, all of which involve especially important or sensitive issues. Although some authorities speak of strictly construing criminal statutes,<sup>252</sup> most require express legislative action before a criminal sanction can be imposed.<sup>253</sup> Statutes exercising the taxing power are another area in which explicit legislative language is required.<sup>254</sup> Similarly, explicit language is required to establish exemp-

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251. Thus the cases sometimes mention "strict construction" and the rule of express legislative action in the same paragraph without discussing whether the two are necessarily the same. *E.g.*, *Herren v. United States*, 317 F. Supp. 1198, 1203 (S.D. Tex. 1970), *aff'd*, 443 F.2d 1363 (5th Cir. 1971) ("since exemptive provisions are matters of exception and legislative grace, they are always given a strict construction, one which refuses to extend the exception by implication or inference . . .") (citations omitted). The imprecision of the term "strict construction" is also discussed in 2A J. SUTHERLAND, STATUTORY CONSTRUCTION (4th ed., C. Sands ed. 1972) [hereinafter cited as SUTHERLAND].

252. *E.g.*, *United States v. Boston & M.R.R.*, 380 U.S. 157, 160 (1965) (criminal statute must be "construed strictly, not loosely"); *State v. Logan*, 198 Kan. 211, 213, 424 P.2d 565, 568 (1971); *State v. Wrobel*, 24 Wis. 2d 270, 274, 128 N.W.2d 629, 631 (1964) (criminal statute must be "strictly construed in favor of the accused").

253. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971), *following United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("Congress [must speak] in language that is clear and definite") and *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (Congress must "plainly and unmistakably" declare conduct criminal before one can be punished for it); *Zaimi v. United States*, 476 F.2d 511, 523-27 (D.C. Cir. 1973). *See also Ladner v. United States*, 358 U.S. 169, 177-78 (1958); *United States v. Resnick*, 299 U.S. 207, 209-10 (1936); *State v. Hahn*, 92 Idaho 265, 267, 441 P.2d 714, 716 (1968). The *Zaimi* decision contains a thorough discussion of this point which may be summarized as follows:

The governing principle is that penal statutes are to be interpreted with exactitude . . . . So it is that "one is not to be subjected to a penalty unless the words of the statute plainly impose it."

476 F.2d at 523-24, *citing United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971).

254. *See Crooks v. Harrelson*, 282 U.S. 55, 61 (1930); *Smietanka v. First Trust*

tions where it is clear that the taxing power has been exercised.<sup>255</sup> Courts have historically required express legislative action in order to establish doctrines in derogation of the common law,<sup>256</sup> although more recent cases have not applied the rule of express legislative action in that context.<sup>257</sup>

In areas of sensitive intergovernmental relationships and in questions relating to sovereign immunity,<sup>258</sup> courts have vigilantly required explicit legislative action. Although the reasoning is not always clear,<sup>259</sup> the rule is most often invoked when statutes arguably en-

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& Sav. Bank, 257 U.S. 602, 606 (1922); *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Greyhound Corp. v. United States*, 495 F.2d 863, 869 (9th Cir. 1974); *B & M Co. v. United States*, 452 F.2d 986, 990 (5th Cir. 1971). In addition, explicit legislative statement is generally required before states are held to have conferred taxing power on counties or municipalities. *Haugen v. Gleason*, 226 Ore. 99, 106, 359 P.2d 108, 111 (1961); *Eugene Theater Co. v. City of Eugene*, 194 Ore. 603, 617, 243 P.2d 1060, 1067 (1952). Similarly, a requirement of express delegation of taxing power to states, counties, or municipalities with regard to federal property can be found in *United States v. City of Roanoke*, 258 F. Supp. 415, 418 (W.D. Va. 1966); *United States v. County of San Diego*, 249 F. Supp. 321, 322-23 (S.D. Cal. 1966).

255. *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1187 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *Herren v. United States*, 317 F. Supp. 1198, 1203 (S.D. Tex. 1970), *aff'd*, 443 F.2d 1363 (5th Cir. 1971); 3 SUTHERLAND, *supra* note 251, § 66.09 at 207.

256. *E.g.*, *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879); *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970); *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *Strauel v. Peterson*, 155 Neb. 448, 453, 52 N.W.2d 307, 309 (1952).

The admission of only those changes of the subject common law which are clearly expressed in the language of a statute serves to perpetuate traditional principles of justice upon which the common law is founded.

3 SUTHERLAND, *supra* note 251, § 66.01 at 42.

257. For discussions of the more liberal approach, see *Teders v. Rothermel*, 205 Minn. 470, 472, 286 N.W. 353, 354 (1939); 2A SUTHERLAND, *supra* note 251, § 58.03 at 466. A major example of the change is *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), in which the California Supreme Court abrogated the doctrine of substantive governmental tort immunity. *Muskopf* produced considerable response among legal scholars. See, *e.g.*, Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

258. The policy behind this rule has been explained by a California court:

Statutes are ordinarily designed for the government of citizens and residents rather than the state, and . . . the state is not bound by general words of a statute or code provisions which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its function, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears.

*Bayshore Sanitary Dist. v. San Mateo*, 48 Cal. App. 2d 337, 339, 119 P.2d 752, 753 (1st Dist. 1941). Or, as the court remarked in *Phillips v. United States*, 346 F.2d 999, 1000 (2d Cir. 1965): "Unfortunately for the plaintiff, the spirit proper to judicial consideration of a waiver of sovereign immunity is not one of generosity and broad interpretation." *Cf. Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). See also *Aycrigg v. United States*, 124 F. Supp. 416, 417-18 (N.D. Cal. 1954).

259. See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* 494-506 (3d ed. 1972); authorities cited at note 257 *supra*.



croach on sovereign prerogatives or otherwise impose liabilities on sovereigns.<sup>260</sup> In *United States v. Bass*,<sup>261</sup> for example, the Supreme Court applied the rule of express legislative action in construing a federal statute that arguably imposed criminal sanctions for the possession of firearms, even though no nexus with interstate commerce had been shown. The Court refused to imply congressional intent to intrude upon an area traditionally under state jurisdiction:

There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.<sup>262</sup>

The Court has also construed acts of Congress to avoid the raising of serious constitutional questions unless Congress makes "its purpose explicit and thereby necessitate[s] . . . decision of the question."<sup>263</sup> This doctrine, like the reasoning in *Bass*,<sup>264</sup> was developed in the highly delicate area of relationships among governmental institutions.<sup>265</sup>

260. *E.g.*, *People v. Centr-O-Mart*, 34 Cal. 2d 702, 703, 214 P.2d 378, 379 (1950); *Greene v. Franchise Tax Bd.*, 27 Cal. App. 3d 38, 42-43, 103 Cal. Rptr. 483, 486 (1972); *Valley County v. Thomas*, 109 Mont. 345, 368, 97 P.2d 345, 358 (1939); *State v. Smith*, 194 Tenn. 582, 586, 253 S.W.2d 758, 760 (1952). Thus it is generally held that waivers of sovereign immunity must be made expressly, *e.g.*, *Stanton v. United States*, 434 F.2d 1273, 1275 (5th Cir. 1970); *United States v. Transocean Air Lines, Inc.*, 386 F.2d 79, 81 (5th Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); *Goldstein v. State*, 281 N.Y. 396, 403, 24 N.E.2d 97, 100 (Ct. App. 1939); that statutes creating a claim against a sovereign must contain specific language to that effect, *e.g.*, *Klamath Indians v. United States*, 296 U.S. 244, 250 (1935); *United States v. Keegan*, 71 F. Supp. 623, 636 (S.D.N.Y. 1947); and that legislative grants by a sovereign must be made explicitly, *e.g.*, *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Northwest Paper Company v. FPC*, 344 F.2d 47, 51 (8th Cir. 1965); *Fullerton v. Central Lincoln People's Utility Dist.*, 185 Ore. 28, 40, 201 P.2d 524, 528 (1948); *State v. Standard*, 414 S.W.2d 148, 153 (Texas, 1967). *But cf.* authorities cited in note 257 *supra*.

261. 404 U.S. 336 (1971).

262. *Id.* at 349 (footnotes omitted).

263. *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (Jackson, J., concurring). The entire quotation reads:

To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question.

*See also, e.g.*, *United States v. Rumely*, 345 U.S. 41, 45 (1953).

264. 404 U.S. 336, 349-50 (1971).

265. *United States v. Five Gambling Devices*, 346 U.S. 441 (1953), involved "a far-reaching question as to the extent of congressional power over matters internal to the individual states," *id.* at 447. In that case, the plurality opinion held that a penal statute should not be construed to reach dealers or gambling devices unless some relation to interstate commerce was proven. *United States v. Bass*, 404 U.S. 336 (1971), involved a similar situation with regard to firearms. The Court there stated that "we will

From this standpoint, it is particularly appropriate that the rule of express legislative action be utilized in resolving treaty disputes, for Indian tribes are institutions possessing at least limited sovereignty.<sup>266</sup>

Moreover, the Supreme Court has repeatedly required express legislative action in regard to statutes that arguably restrict important personal rights.<sup>267</sup> A leading example is *Ex parte Endo*,<sup>268</sup> in which the Court sharply limited the power of the War Relocation Authority to detain American citizens of Japanese descent:

We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure, we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizens than was clearly and unmistakably indicated by the language they used.<sup>269</sup>

The same judicial rigor has been applied in security clearance cases,

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not be quick to assume that Congress has meant to affect a significant change in the *sensitive relation* between federal and state criminal jurisdiction." 404 U.S. at 349 (emphasis added). This discussion is, of course, directly applicable to federal-Indian relations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), established the basic role of Indian tribes in the federal system as being that of "domestic dependent nations." *Id.* at 17. Treaties fit into the federal system as the "Supreme law of the land." U.S. CONST. art. VI, § 2. Further, as discussed in section I, *supra*, Indians supposedly receive a special judicial consideration that allows Indian treaties to be abrogated only if the national interest "demand[s]" it, "particularly if consistent with perfect good faith towards the Indians." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). In 1974, the Supreme Court described the legal status of Indian tribes under federal law as "unique," detailing the "particular and special treatment" given Indians today. *Morton v. Mancari*, 417 U.S. 535, 551, 554-55 (1974). See generally notes 12-16, 57-66 *supra*. In light of this special status of Indian tribes, it is difficult to argue that, while there must be a "clear statement" of congressional intent before the "sensitive" federal-state relation can be changed, less may be required in dealing with Indians.

266. See notes 13-16 *supra* and accompanying text.

267. As a federal district court described the requirement:

[T]he Supreme Court has made it plain that only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights.

*Woodward v. Rogers*, 344 F. Supp. 974, 985 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973) (citations omitted).

268. 323 U.S. 283 (1944).

269. *Id.* at 300. This case involved a habeas corpus proceeding alleging unlawful detention. In granting the writ, the Court reached its decision apart from constitutional issues by examining the relevant legislation and executive order and finding therein no express power of detention over the plaintiff. The Court held that "the greatest possible accommodation of the liberties of the citizen" would require any such power to be narrowly confined to the precise purpose of the evacuation program as an espionage and sabotage measure. *Id.* at 302.

such as *Greene v. McElroy*,<sup>270</sup> in which the Court required explicit action by lawmakers before depriving a person of the right to follow his chosen profession without full hearings. Although it can be argued that treaty abrogation cases involve only property rights, it should be remembered that the land plays a central role in Indian cultural and religious life and is thus far more important to Indians than non-Indians.<sup>271</sup> Furthermore, abrogation may also deprive Indians of their livelihood—an important consideration, as the court in *Greene* recognized<sup>272</sup>—since treaty-guaranteed fishing rights provide many Indians with a major source of income.<sup>273</sup>

Recent cases in the area of natural resource law, because they also involve a trust relationship, are the most relevant to the question of Indian treaty abrogation. Several courts and commentators, notably Professor Joseph Sax, have concluded that the public trust doctrine requires legislatures to make open and express decisions on policy matters involving land held in the public trust.<sup>274</sup> The legal issue arises when the governmental agency in charge of administering lands that have been set aside by the government and devoted to the public good seeks to use the land for other purposes.<sup>275</sup>

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270. *Greene v. McElroy*, 360 U.S. 474, 507 (1959). The Court there mentioned its concern "that traditional forms of fair procedure not be restricted by implication or without *the most explicit action* by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Id.* at 508 (emphasis added). Among other cases, the Court in *Greene* cited *Kent v. Dulles*, 357 U.S. 116 (1958), dealing with the right to passports of members of the Communist party: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129. Again, note the failure of courts to make the important distinction between "construe narrowly" and the requirement of "explicit action by lawmakers."

271. See text accompanying notes 17-19 *supra*.

272. See 360 U.S. at 506-08.

273. See text accompanying note 21 *supra*.

274. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Sax].

275. Professor Sax describes *Illinois C.R.R. v. Illinois*, 146 U.S. 387 (1892), as "The Lodestar in American Public Trust Law." *Id.* at 489. In *Illinois Central*, the Supreme Court held invalid a grant, by the Illinois legislature to the Illinois Central Railroad, of valuable land under the navigable waters of Lake Michigan. The Supreme Court described the State's interest:

It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . . The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers. . . .

146 U.S. at 452-53. In his discussion of *Illinois Central*, Professor Sax stated:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

SAX, *supra* note 274, at 490 (emphasis in original). Early use of a public trust concept

The leading recent case on the public trust doctrine is *Gould v. Greylock Reservation Commission*,<sup>276</sup> a 1966 decision by the Supreme Judicial Court of Massachusetts. At the turn of the century a group of citizens had succeeded in setting aside 9,000 acres of isolated mountain country as a state reservation, similar to a state park.<sup>277</sup> Some 60 years later the Greylock Reservation Commission, which had been created by the state legislature to maintain the reservation, leased 4,000 acres of the reservation to a joint venture which was to build and operate an extensive skiing development.<sup>278</sup>

Five citizens brought suit as beneficiaries of the public trust that had allegedly been imposed on the reservation. They sought to have the lease and management agreement set aside. In light of the extremely broad statutory grant of authority to the Reservation Commission,<sup>279</sup> normal rules of statutory construction would probably have resulted in a finding that the administrative action was authorized. The court, however, found that a public trust had been imposed on the reservation land.<sup>280</sup> It then struck down the attempted deviation from the original public use, holding that there must be a "clear or express statutory authorization" before the original use may be altered.<sup>281</sup>

The doctrine was taken a step further by another Massachusetts

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can be found in *Kimball v. MacPherson*, 46 Cal. 103 (1873); *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896). More recent cases include *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972). See also Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971).

276. 350 Mass. 410, 215 N.E.2d 114 (1966).

277. *Id.* at 411-12, 215 N.E.2d at 116.

278. *Id.* at 415-19, 215 N.E.2d at 119-21.

279. The Commission was authorized:

[to construct an aerial tramway, and] approach roads to the . . . base of the tramway; parking facilities . . . *ski facilities*, stores, including gift, souvenir and ski or equipment shops; dining and refreshment facilities; lounges, comfort stations, warming huts and such other accommodations for the convenience . . . of the public; and such other facilities and services as are *reasonably necessary* for the public purposes of the authority.

*Id.* at 414 n.6, 215 N.E.2d at 118 n.6 (emphasis in original). The Commission was also empowered to make contracts necessary or incidental to its duties, "to lease or grant the right to exercise such powers," and to do all "things necessary or convenient to carry out the powers expressly granted." *Id.*

280. *Id.* at 419, 215 N.E.2d at 121.

281. *Id.* at 426, 215 N.E.2d at 126. Massachusetts law provided a strong foundation for this requirement. An early case stated: "Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end," in *Higginson v. Slattery*, 212 Mass. 583, 591, 99 N.E. 523, 527-28 (1912) (citations omitted). The legislative intent must be "unequivocally expressed," *Commonwealth v. Massachusetts Turnpike Authority*, 346 Mass. 250, 254, 191 N.E.2d 481, 484 (1963). The *Gould* decision was particularly significant in that it involved an action initiated by private citizens rather than a conflict between public agencies.

case, *Robbins v. Department of Public Works*,<sup>282</sup> in which the court dealt with an administrative agency's attempt "to divert parklands, Great Ponds, reservations and kindred areas to new and inconsistent public uses."<sup>283</sup> It held that such lands could not be put to new uses without a "plain and explicit" statutory statement setting forth (1) the legislature's knowledge of the existing public use and (2) an authorization of the new use.<sup>284</sup> As the court explained: "In short the legislation should express not merely the public will for the new use but its willingness to surrender or forego the existing use."<sup>285</sup>

Although the Illinois Supreme Court has declined<sup>286</sup> to follow *Gould* and the landmark analysis of Professor Sax,<sup>287</sup> other courts have treated the rule of express legislative action as controlling in the public trust field,<sup>288</sup> as have the commentators.<sup>289</sup> Older cases are to the same effect.<sup>290</sup> The parallel between changing the use of public trust lands, which are held in trust for the public, and changing the use of Indian lands, which are held in trust for the tribes, is apparent.

The policy behind the rule of express legislative action bears most

282. 355 Mass. 328, 244 N.E.2d 577 (1969). An intervening case, *Sacco v. Department of Public Works*, 352 Mass. 670, 227 N.E.2d 478 (1967), enjoined the Department of Public Works from filling a pond in order to relocate part of a state highway. In *Sacco*, the Massachusetts Supreme Judicial Court stated that "[w]here land devoted to a public purpose is concerned, specific statutory language is required." *Id.* at 673, 227 N.E.2d at 480 (emphasis in original).

283. 355 Mass. at 331, 244 N.E.2d at 580.

284. *Id.*

285. *Id.*

286. *Paepcke v. Public Building Comm'n*, 46 Ill. 2d 330, 343, 263 N.E.2d 11, 19 (1970); cf. *People ex rel. Stamos v. Public Building Comm'n*, 40 Ill. 2d 164, 238 N.E.2d 390 (1968).

287. See note 274 *supra*.

288. *Abbott v. Commissioners of Dukes County*, 357 Mass. 784, 260 N.E.2d 142 (1970); *Town of Brookline v. Metropolitan Dist. Comm'n*, 357 Mass. 435, 258 N.E.2d 284 (1970); *Opinion of the Justices*, Mass. Adv. Sh. (1971) 1307, 274 N.E.2d 336 (1971); *State v. Bnnkowski*, 88 Nev. 623, 634, 503 P.2d 1231, 1238 (1972); *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763, 775, 330 N.Y.S.2d 495, 509 (Sup. Ct. 1972). A Mississippi case went even further, holding invalid an express legislative conveyance of marshlands made 80 years earlier. *International Paper Co. v. Mississippi State Highway Dep't*, 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973).

289. Colien, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388, 391; 26 RUTGERS L. REV. 868, 885 (1973).

290. See *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880); *People v. California Fish Co.*, 166 Cal. 576, 597, 138 P. 79, 88 (1913); *City of Galveston v. Mann*, 135 Tex. 319, 332, 143 S.W.2d 1028, 1034 (1940); *McLennan v. Prentice*, 85 Wis. 427, 443, 55 N.W. 764, 770 (1893); *Rayor v. City of Cheyenne*, 63 Wyo. 72, 178 P.2d 115 (1947). *Illinois C.R.R. v. Illinois*, 146 U.S. 387 (1892), and *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896), found invalid conveyances even though the legislature had expressly authorized them. But see, e.g., *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957); *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221 (1919); *State v. Cleveland & P.R.R.*, 94 Ohio St. 61, 113 N.E. 677 (1916).

careful consideration. The result of applying the rule and denying effect to the proposed action, generally by an administrative agency, is not to thwart the proposed action permanently. Nor is congressional intent lastingly frustrated. The only party "thwarted," at least temporarily, is the administrative agency or other body claiming to be fulfilling the unspoken will of the legislature. Thus the result of applying the rule is to send the matter back to the legislature for more specific consideration.<sup>291</sup> The court is thus applying a rule of true judicial deference by recognizing that the issue is one which should be confronted by the legislature rather than the courts.<sup>292</sup> This results in "democratization" of the decisionmaking process:

To send such a case back for express legislative authority is to create through the courts an openness and visibility which is the public's principal protection against overreaching, but which is often absent in the routine political process. Thus, the courts should intervene to provide the most appropriate climate for democratic policy-making.

. . . .

. . . The [Massachusetts] court has not attempted to make policy decisions concerning the proper use of public trust lands, but has instead developed a means for insuring that those who do make the decisions do so in a publicly-visible manner. The Court has served notice to all concerned that it will view with scepticism any dispositions of trust lands and will not allow them unless it is perfectly clear that the dispositions have been fully considered by the legislature.<sup>293</sup>

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291. See *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 141 (1960) (Black, J., dissenting); *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953), set out at note 263 *supra*.

292. See Frankfurter, *Some Reflections on the Reading of Statutes*, 57 COLUM. L. REV. 527, 539-40 (1947).

The history of congressional legislation . . . regulating not only interstate commerce as such but also activities intertwined with it, justifies] the generalization that, when the Federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are *reasonably explicit* and do not entrust its attainment to that *retrospective expansion of meaning* which properly deserves the stigma of judicial legislation.

*Id.* at 540 (emphasis added). See also, Breitell, *The Lawmakers*, 65 COLUM. L. REV. 749, 762 (1965) ("The legislature has the richest apparatus for ascertaining the conditions in which the conflicting social interests are embroiled and the most democratic way of resolving them . . .").

293. Sax, *supra* note 274, at 495-96, 502. Professor Jaffe makes the same point:

Delegation as the handmaiden of regulation is distasteful to the holders of economic power, but there is also the general concern that large decisions of policy should be grounded in consent. Consent is the product of compromise and can only be arrived at through representation. The legislature comprises a broader cross section of interests than any one administrative organ; it is less likely to be "captured" by particular interests.

The United States Supreme Court has also recognized that democratization is achieved by the rule of express legislative action:

[E]xplicit [legislative] action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.<sup>294</sup>

As Professor Sax has noted, such an approach is particularly appropriate where such fundamental decisions can be made with "low visibility."<sup>295</sup> Since administrative agencies often have well-defined constituencies capable of exerting considerable pressure,<sup>296</sup> the courts should properly be concerned with ensuring that the administrative process will be supplemented by full and fair legislative hearings when necessary. Thus one important premise of the rule of express legislative action is that low-visibility administrators should act only within the clearly delineated bounds of their authority when making decisions with major policy ramifications.

The rule of express legislative action has significant corollary benefits. For example, requiring a specific statement by the legislature should discourage future litigation by making the factual and legal situation clearer. Although ambiguities can exist in any statute, "[t]he chief value of an express repeal is in the fact that it generally leaves no uncertainty as to whether the statute or parts of the statutes designated have been repealed."<sup>297</sup> Justice Frankfurter suggested that strict guidelines for construction of statutes "make for careful draftsmanship and for legislative responsibility."<sup>298</sup> Furthermore, by requiring an explicit legislative statement, the rule will not "enlis[t] too heavily the private social and economic views of judges."<sup>299</sup> Thus the rule of express legislative action focuses the decisionmaking process on Congress, where it properly belongs, and not on the courts.

In deciding whether to apply the rule of express legislative action, courts have based their determinations, either explicitly or implicitly,

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Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 354, 359 (1947).

294. *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

295. SAX, *supra* note 274, at 498.

296. *Id.* at 495. Administrative agencies dealing with Indian issues are especially ripe for control by large pressure groups because tribal resources are often coveted by powerful private interests such as coal companies, power companies, railroads, and land developers. See notes 23-27 *supra* and accompanying text.

297. 1A SUTHERLAND, *supra* note 251, § 23.07 at 219.

298. Frankfurter, *Foreward to a Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 367 (1950).

299. *Id.* at 368.

upon the importance of the subject matter at issue.<sup>300</sup> The Supreme Court has stated that the rule is appropriate in "traditionally sensitive areas,"<sup>301</sup> and a lower court has noted that the Supreme Court has applied the rule in cases "limiting the free exercise of important rights."<sup>302</sup> Scholars have found the rule applicable to "large decisions of policy"<sup>303</sup> and "fundamental problems."<sup>304</sup> The rule of express legislative action should not be over-extended, since a wholesale application of the rule could effectively hamstring legislatures. Legislatures must necessarily deal in generalities in this complex society, delegating many decisions to administrative agencies.<sup>305</sup> Nevertheless, courts are becoming much more chary of the unfettered exercise of power by administrators,<sup>306</sup> especially when they are making major policy decisions not clearly delegated by the legislature. Courts have thus balanced the interests involved, applying the rule of express legislative action in certain areas of major importance. Implicit in this process is the recognition that certain questions are best answered by legislators rather than courts or administrators.

### B. The Rule Applied to Treaty Abrogation

The relationship of Congress toward the American Indian is char-

300. Early recognition of this analysis is found in an opinion by Chief Justice Marshall:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

301. United States v. Bass, 404 U.S. 336, 349 (1971). Bass also rested on the "seriousness of criminal penalties" and "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." 404 U.S. at 348 (citation omitted). See also Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825), set out at note 300 *supra*.

302. Woodward v. Rogers, 344 F. Supp. 974, 985 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973).

303. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 354, 359 (1947).

304. SAX, *supra* note 274, at 566.

305. E.g., American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); Pressman v. Barnes, 209 Md. 544, 555, 121 A.2d 816, 822 (1956).

306. See, e.g., Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971); United States v. Bryant, 439 F.2d 642, 652 n.22 (D.C. Cir. 1971) (recognizing "an incipient but powerful trend in the law—a new refusal to rely blindly upon the unstructured exercise of official discretion . . ."); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (reimand of administrative refusal to suspend the registration of DDT as a pesticide; "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts"); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964).



acterized by uniquely broad power<sup>307</sup> and a fiduciary's duty.<sup>308</sup> At issue is the level congressional dealings should attain to be consistent with that power and duty. Today, although most courts have come to recognize that many substantive rights cannot be guaranteed unless procedural amenities are provided,<sup>309</sup> some decide questions of Indian treaty abrogation by tests not markedly different from those they use to repeal statutes by implication.<sup>310</sup> Yet surely it is reasonable to treat Indian treaties, which define important substantive rights<sup>311</sup> and are stamped with a trust relationship,<sup>312</sup> by a stricter standard.<sup>313</sup> Under the highly unusual circumstances in which treaty abrogation claims arise, applying the rule of express legislative action would ensure that these decisions are made in a manner consonant with "the most exacting fiduciary standards" to which the federal government must be held in its dealings with Indians.<sup>314</sup> The analysis of two highly significant recent Supreme Court

307. See note 66 *supra*.

308. See text accompanying notes 62-66 *supra*.

309. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring): "It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

310. Compare authorities discussed in section II.A *supra*, with *Amell v. United States*, 384 U.S. 158, 165-66 (1966) (party seeking repeal of statute by implication "bears a heavy burden of persuasion"), *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565 (1963) (implied repeal of statute only upon "some manifest inconsistency or positive repugnance between the two statutes"), and *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (repeals of statutes are "not favored" and the intention of the legislature must be "clear and manifest").

311. See text accompanying notes 13-21 *supra*.

312. See text accompanying notes 57-66 *supra*.

313. An analogy to trust law, which is applicable here, see notes 61-66, *supra*, would lead to the conclusion that beneficiaries should receive notice of major changes in the administration of the trust. For example, all beneficiaries must be notified, and joined as parties if litigation is necessary, when a trustee seeks to deviate from the terms of the trust and sell trust property. G. BOGERT, *TRUSTS AND TRUSTEES* § 742 (2d ed. 1959). See also *Ruddock v. American Med. Ass'n*, 415 Ill. 63, 70, 112 N.E.2d 107, 111 (1953); *Field v. Lloyd*, 453 S.W.2d 570, 573 (Ky. App. 1970). Furthermore, a trustee is required to give full disclosure of all important matters concerning the trust. See, e.g., *United States Nat'l Bank v. Guiss*, 214 Ore. 563, 584-86, 331 P.2d 865, 875-77 (1958); *In re Bard's Estate*, 339 Pa. 433, 437, 13 A.2d 711, 713 (1940); BOGERT *supra*, § 961; cf. 2 A. SCOTT, *TRUSTS* 1387 (3d ed. 1967). Such requirements concerning notice and disclosure to beneficiaries follow from the principle, set forth by Chief Justice Cardozo, that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), quoted in *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942).

314. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966); *Pyramid Lake Paiute*

cases, *Seymour v. Superintendent*<sup>315</sup> and *Mattz v. Arnett*,<sup>316</sup> leads inevitably to this result, and the Eighth Circuit, in its recent decision in *United States v. White*,<sup>317</sup> has expressly adopted such a rule. The Supreme Court should do the same.

Requiring an explicit statement by the legislature would not necessitate a significant departure from the normal procedures of Congress.<sup>318</sup> The opinions in *Williams v. Lee*,<sup>319</sup> *Mattz v. Arnett*,<sup>320</sup> the *Standing Rock Sioux* case,<sup>321</sup> and *Nicodemus v. Washington Water Power Co.*<sup>322</sup> all provided examples of express abrogations by Congress. Specific legislation determined the rights of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota when

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*Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

315. 368 U.S. 351 (1962).

316. 412 U.S. 481 (1973), discussed in text accompanying notes 144-47 *supra*. No mistake should be made concerning the monumental impact of *Seymour*, *Mattz*, and other recent Supreme Court cases in the field of Indian law. See *Morton v. Mancari*, 417 U.S. 535 (1974) (hiring preference of Bureau of Indian Affairs for Indians not invidious racial discrimination under Fifth Amendment); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (unassimilated Indian residing "near" but not "on" reservation could not be denied general assistance benefits based on "unpublished ad hoc determination" by Bureau of Indian Affairs official, in light of "distinctive obligation" to Indians and "overriding duty of Federal Government to deal fairly with Indians"); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (ejectment proceeding, normally justiciable only in state court, raises federal question when Indian land involved, even though no ongoing treaty relationship with tribe); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973) (reservation Indian not subject to state income tax for income earned on the reservation). None of these cases, however, establishes truly new law, because each result flows logically from the trust relationship or from tribal sovereignty, the two root doctrines of Indian law first set forth in Chief Justice Marshall's great opinions in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). These recent cases make it clear that both doctrines remain vigorous and far-reaching.

317. 508 F.2d 453 (8th Cir. 1974) (2-1 decision).

318. Recognizing this rule in regard to Indian treaties would not mean that it would have to be applied to international treaties. As noted earlier, the courts have properly treated the two kinds of treaties differently, both as to construction of rights, see notes 104-05 *supra* and accompanying text, and as to abrogation, see notes 106-07 *supra* and accompanying text. A practical distinction can also be made. There are presently some 4,300 international treaties in force, and the number will increase as new treaties are made. See U.S. DEPT. OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS IN FORCE ON JANUARY 1, 1973. Since Indian treaty-making has long been prohibited, see notes 55-56 *supra* and accompanying text, the number of Indian treaties cannot increase beyond the 389 treaties that were in force in 1939. See COHEN, FEDERAL INDIAN LAW, *supra* note 8, at 457 *et seq.* Thus a rule of express legislative action is much more manageable in the context of Indian treaties.

319. 358 U.S. 217, 221 n.6 (1959).

320. 412 U.S. 481 (1973).

321. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 199-200 (D.S.D. 1958), *vacated as moot mem. sub nom. United States v. Sioux Indians*, 259 F.2d 571 (8th Cir. 1958).

322. 264 F.2d 614 (9th Cir. 1959).

their land was taken for the construction of the Garrison Dam.<sup>323</sup> Congress included detailed provisions concerning the rights of the Fort McDowell Apache Tribe in the legislation concerning the massive Central Arizona Project.<sup>324</sup> Only recently, the legislation authorizing the Colorado River Desalinization Plant included explicit provisions compensating the Cocopah Tribe of Indians for their reservation land that will be taken to carry out the project.<sup>325</sup>

Importantly, the rule proposed here would not unduly hamper Congress. If the courts found that Congress had not appropriately provided for an abrogation it wished to accomplish, Congress could act quickly to rectify the matter:

If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization. It has been known to pass a Joint Resolution in one day where this Court interpreted an Act in a way it did not like . . . Such action would simply put this question of authorization back into the hands of the Legislative Department of the Government where the Constitution wisely reposed it.<sup>326</sup>

Thus the proposed rule does not conflict with the established power of Congress to abrogate Indian treaties.<sup>327</sup> On the contrary, the rule deals only with the procedures that must be followed in the proper exercise of congressional power.

Moreover, and this point cannot be overemphasized, this test would be fully consistent with the Nation's recognized obligations to Indian tribes. The Court has consistently characterized the relationship between Congress and the American Indian as "solemn,"<sup>328</sup> "unique" or "special,"<sup>329</sup> and "moral."<sup>330</sup> The case that established the

323. See Act of Oct. 29, 1949, ch. 790, 63 Stat. 1926.

324. 43 U.S.C. § 1522 (1970).

325. Act of June 24, 1974, § 102(e), 88 Stat. 266.

326. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 141 (1960) (citation omitted) (Black, J., dissenting). Congress has shown that it can also act quickly in Indian affairs. In 1883, the Supreme Court held that federal courts did not have jurisdiction over the murder of an Indian by an Indian on a reservation. *Ex parte Crow Dog*, 109 U.S. 556 (1883). Congress was "shocked" by the decision, *COHEN, FEDERAL INDIAN LAW*, *supra* note 8, at 78, and promptly passed legislation establishing federal jurisdiction over seven major crimes committed on reservations. See Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified at 18 U.S.C. § 1153 (1970)). See also *United States v. Kagama*, 118 U.S. 375, 382 (1886).

327. See note 11 *supra* and accompanying text.

328. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 641, 654 (1890); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

329. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 540 (1974); *United States v. Sandoval*, 231 U.S. 28, 39 (1913); *Navajo Tribe v. United States*, 364 F.2d 320, 323 (Ct. Cl. 1966).

330. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United*

right of Congress to abrogate treaties, *Lone Wolf v. Hitchcock*,<sup>331</sup> cautioned that abrogations should be made only "if consistent with perfect good faith towards the Indians."<sup>332</sup> Other cases have stated that Indian treaties represent "the word of the Nation"<sup>333</sup> and "should be so construed as to uphold the sanctity of the public faith."<sup>334</sup> Similarly, Presidents from Washington<sup>335</sup> to Nixon<sup>336</sup> have characterized the Nation's commitments to Indians in moral terms.

Morality and good faith are not notions which can be dispensed with lightly, for they have played a major part in the development of our jurisprudence.<sup>337</sup> No judge should be reluctant to consider such factors in analyzing the duty the federal government owes American Indians. Indeed, there is perhaps no area of public law in which such considerations should play a larger part. The rule of express legislative action suggested here is consistent with these principles. Although abrogation would be permitted in furtherance of the national interest, no abrogation would occur without full notice and disclosure to the affected tribes.

### CONCLUSION

Justice Black, discussing the abrogation of Indian treaties, stated that "[g]reat Nations, like great men, should keep their word."<sup>338</sup> This Article does not reach that broad question of philosophy and mo-

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States v. Payne, 264 U.S. 446, 448 (1924); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

331. 187 U.S. 553 (1903).

332. *Id.* at 565-66.

333. *United States v. Winans*, 198 U.S. 371, 380 (1905).

334. *Ward v. Race Horse*, 163 U.S. 504, 516 (1896).

335. See THE NEW AMERICAN STATE PAPERS (4 Indian Affairs) 26 (1972).

336. See *The American Indians—Message from the President of the United States [to Congress]* 116 CONG. REC. 23131, 23132 (1970) (characterizing treaties as carrying "immense moral and legal force").

337. Many jurisprudential thinkers agree that moral principles provide the foundation to law. Law is subservient to morality and exists to enable man to comply with moral duties and dictates. See, e.g., E. CAHN, THE MORAL DECISION? RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW (1955); W. FRIEDMAN, LEGAL THEORY 268-74 (5th ed. 1967); R. POUND, JURISPRUDENCE 215 (1959); J. STONE, THE PROVINCE AND FUNCTION OF LAW 371-77 (2d ed. 1950); Pound, *Law and Morals—Jurisprudence and Ethics*, 23 N. CAR. L. REV. 185 (1945). The following statement is particularly pertinent:

Any arbitrary breach of these ramparts [human rights] by the law or legal order itself—either through a total or partial abolition of the individual rights of man, or through the failure of the Law effectively to prevent any arbitrary infringement upon these rights by others—deprives the Law of its *raison d'être* . . . . In this the Law must always remain subservient to the moral interests of rational man.

Chroust, *Law and Morals*, 25 B.U.L. REV. 348, 363-64 (1945).

338. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion).

reality. For better or worse, Congress is the custodian of the Nation's honor when it comes to breaching Indian treaties.

This Article does deal with the procedures to be employed when this Nation deliberates on whether its word, as expressed in Indian treaties, will be kept. Indians are becoming increasingly effective at presenting their causes legislatively, and legislators are becoming increasingly responsive to Indian needs.<sup>339</sup> It is therefore reasonable to assume that tribes will come before a fair body when their most precious rights are threatened. Certainly, Congress is an infinitely more appropriate forum than the back rooms of the Army Corps of Engineers, the Bureau of Reclamation, the Washington State Department of Game, or the Southern Pacific Railroad. Even the courts cannot provide as fair a hearing as Congress, for they are constrained by long-standing precedent that requires them to turn to the hazy shadows of congressional intent. The conclusion, then, is that issues of such legal and moral magnitude should be aired publicly and directly, with due notice to the tribe in question. Treaty rights should be abrogated only by an

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339. Because of their lack of numerical strength and financial resources, Indians are typically at a disadvantage in overcoming the powerful lobbies which often oppose Indian interests. See notes 24-26 *supra*, and accompanying text, and note 296 *supra*. Nevertheless, the 1970's have been marked by the most effective Indian lobbying efforts in history. After waging a compelling legislative campaign, the Taos Pueblo of New Mexico regained its sacred Blue Lake. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437. The Payson Community of Yavapai-Apache Indians of Arizona achieved federal recognition plus 85 acres of land for a reservation. Act of Oct. 6, 1972, Pub. L. No. 92-470, 86 Stat. 783. The Menominee Tribe of Wisconsin, after years of work in Wisconsin and Washington, D.C., succeeded in getting passed the historic Menominee Restoration Act, thus reversing the disastrous termination policy of the 1950's. See note 185 *supra*. The Havasupai Tribe of Arizona obtained, over opposition of environmental groups, an addition to their reservation totalling some 185,000 acres. See The Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, § 10, 88 Stat. 2089, 2091-93 (1975). In 1972, the Yakima Tribe of Washington successfully asserted its claim to some 21,000 acres of traditional tribal land near Mount Adams, which had been taken from them in the early 1900's due to a surveying error. Exec. Order No. 11,670, 37 F.R. 10431 (May 23, 1972). In the administrative area, a broadly based national coalition of tribes, educational organizations and parent groups forced a major revision of the Bureau of Indian Affairs' regulations for the Johnson-O'Malley Act, 25 U.S.C. §§ 452-54 (1970), which provides supplemental education funds for Indian children. See 25 C.F.R. §§ 33.1-6 (Supp. 1974). All of the above efforts are doubly significant because they were conceived and effected by Indians in "Indian country," not by federal officials in Washington. Recent, highly progressive legislation was drafted in Washington, but received nationwide tribal support. See The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975), which extends management and control over numerous federal programs, grants and contracts to tribes. The Hopi and Navajo tribes also developed sophisticated lobbying organizations, although the two tribes were contending against each other, not outside interests, concerning the Joint Use Area in Arizona. See Act of Dec. 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712. Effective lobbying by Indians and increased congressional responsiveness are not the only factors in recent legislative and administrative gains by Indians. Officials such as Interior Secretary Morton and Interior Solicitor Frizzell have also played important roles.

explicit congressional statement, both of the specific promises about to be broken and of the intent of Congress to break them.

The courts as well as the tribes should be able to look directly to the express acts of Congress, which the law of Indian affairs recognizes as the ultimate arbiter of questions relating to the legal rights of American Indians. Adopting the rule of express legislative action proposed here would permit this Nation to break its word, but only after deliberate congressional consideration on the merits. Given the paramount importance of many treaty abrogation issues to the American Indian, there simply is no justification for continuing to leave abrogation questions to judicial guesswork.